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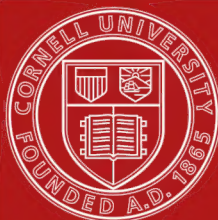
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Leading cases in the law of real propert



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LEADING CASES
IN THE
LAW OF REAL PROPERTY

DECIDED IN THE AMERICAN COURTS.

With Notes

BY

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AND

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VOL. I.

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TO THE MEMORY
OF
THE HONORABLE PETER McCALL,

THE CHRISTIAN GENTLEMAN AND ERUDITE LAWYER,
WHO GAVE DURING HIS LIFETIME
AN EXAMPLE OF ALL THE HIGH AND NOBLE QUALITIES WHICH
SHOULD DISTINGUISH A MEMBER OF THE BAR,
THIS BOOK IS DEDICATED
BY
THE EDITORS,
ONE OF WHOM WAS HIS FELLOW-STUDENT AND
LIFE-LONG FRIEND, AND THE OTHER
ENJOYED THE PRIVILEGE OF
BEING HIS PUPIL.

PREFACE.

As remarked by Judge Hare and Mr. Wallace in the preface to *American Leading Cases*, the title "Leading Cases" cannot be applied with the same accuracy of expression to a collection of American decisions as to a similar collection of English; and while, perhaps, an American leading case, in the strict sense, except upon a constitutional question, is an impossibility, yet it cannot be denied that certain cases decided in American courts have had practically a leading effect through their influence, although denied that authoritative weight which characterizes a leading case in England; or that certain cases may be found amongst those decided by American courts which present the principles of law bearing upon certain subjects in a peculiarly clear and useful manner.

A collection of such cases is what the editors of the present work have endeavored to make, to which they have added notes upon the subjects which the cases have been chosen to illustrate. It is believed that these notes will be found useful; they are, at least, the result of a most laborious examination of the cases cited in them, coupled with an endeavor to present the principles found in such cases in as logical an order as possible.

It will be observed that the notes as well as the leading cases are emphatically American, English cases being cited but occasionally, and only by way of illustration or to sustain a principle generally recognized as a component part of the law in this country, for which the editors have been unable to find any decided case upon this side of the Atlantic.

Such is the general character of the work, which is now submitted to the profession in the hope that it may not have been written in vain.

The editors desire to express their acknowledgments to Charles H. J. Chormann, Esq., of the Philadelphia Bar, for his careful labor in the preparation of the table of cases.

PHILADELPHIA, December, 1882.

ADDENDA ET CORRIGENDA.

- Page 362. 8th line from foot, read 28 *N. J. Eq.* instead of 28 *N. Y. Eq.*
- “ 376. 13th line from foot, insert Pennsylvania, 1 Pur. Dig. p. 463,
pl. 22.
- “ 514. 7th line from foot, insert the words “this right” between
“exercise” and “by treaty.”
- 6th line from foot, strike out the period after “full” and
insert a comma.

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LEADING CASES

IN THE

LAW OF REAL PROPERTY.

Fee Simple—Creation of: By Deed; by Devise.

ADAMS v. ROSS.

*Court of Errors and Appeals of New Jersey. Argued, February Term, 1860;
decided, June Term, 1860.*

[Reported in 1 Vroom 505.]

1. A deed made by A. B., in consideration of love and affection and of one dollar, to C. D., wife of E. F., in which the said A. B. doth grant, bargain, sell, alien, remise, release, and confirm certain real estate to the said C. D., during her natural life, and at her death to her children which may be begotten of her present husband: to have and to hold the said premises unto the said C. D. for and during her natural life, and at her death to her children which may be begotten of her present husband, E. F., and containing covenants of seizin and general warranty, which are made by the grantor for herself and her heirs with the grantee and her heirs and assigns, conveyed to the grantee an estate for life only, with a remainder vested in G. H., a child of the said C. D., for life, subject to open, and let in afterborn children to the same estate.
2. The estate created was not an estate in fee or in fee tail, there being in the grant no words of inheritance or procreation.
3. The covenants warranting the premises to C. D. and her heirs did not enlarge the estate, nor pass by estoppel a greater estate than that expressly conveyed.
4. A warranty attaches only to the estate granted, or purporting to be granted. If it be a life estate, the covenantor warrants nothing more; the conveyance being the principal, the covenant the incident.
5. In the construction of a deed, the question is, not what estate did the grantor intend to pass, but what estate did he pass by proper and apt words. No expression of intent, no amount of recital showing the intention, will supply the omission.

6. A mortgage made after the conveyance, and while the said C. D. was a minor, created no valid charge on the estate against the said C. D.
7. The grant made to C. D. was within the provisions of an act for the better securing the property of married women, passed March 25th, 1852, the deed being subsequent to the act.
8. The husband not entitled to courtesy in the premises on surviving his wife, the grantee.

Error to the Supreme Court.

On the 9th September, 1854, Anna V. Traphagen conveyed, by deed, to Catharine Ann V. B. Adams, wife of Alonzo W. Adams, certain lots and real estate, situate in Jersey City, for and in consideration of natural love and affection and of one dollar paid. The terms used in the deed were, "grant, bargain, sell, alien, remise, and release and confirm, unto Catharine Ann V. B. Adams, wife of Alonzo W. Adams, all that, etc., situate, etc., for and during the natural life of the said Catharine, and at her death to her children which may be begotten of her present husband, Alonzo W. Adams."

The deed contained covenants of seizin, for quiet enjoyment, against encumbrances, for further assurance and of warranty, which covenants were made by the grantor, for herself and her heirs, with the grantee, her heirs and assigns.

When the deed was made, the said Catharine Ann V. B. Adams was a minor; and on the 13th day of October, being still a minor, she joined her husband in a mortgage on the premises to William B. Ross, to secure the payment of the sum of \$6000.

A part of the premises was afterwards, under the authority of law, condemned for the benefit of the Erie Railway Company, the assessed value of which, being \$3061, was brought into the Supreme Court for distribution among the parties, according to their respective rights, the money representing the whole value of the land taken.

The parties interested were heard before the court, in June term, 1858, on an application of Ross, the mortgagee, to be paid his mortgage out of the money in court.

The main question was the construction to be given to the deed made by Anna V. Traphagen to Catharine Ann V. B. Adams, on the 9th September, 1854.

After full argument by *A. C. M. Pennington* for the applicant, *J. F. Randolph* for Alonzo W. Adams, and *A. O. Zabriskie* for Anna V. B.

Traphagen and others, the opinion of the court was delivered as follows, by

VREDENBURGH, J.—The Erie Railroad Company, in 1856, took, under the provisions of their charter, the west half of lots No. 1, 2, 3, and 4, of block 159, on Mangin's map of Jersey City. The jury assessed their value at \$3061, which has been brought into this court. The charter vests the entire interest in the land in the company. This money represents the whole fee simple.

The applicant claims to have the whole of this money paid over to him. This is resisted by Miss Traphagen, Mr. and Mrs. Adams, and in behalf of the minor children of Mr. and Mrs. Adams, who all claim to have held different interests in the land. This money represents the land, and it is manifest that we should dispose of it, as nearly possible, as if it were the land itself.

First. As to the claim of Mr. Ross. In its support he shows that, at and prior to the 9th of September, 1854, the land belonged in fee to Miss Traphagen; that she, on that day, made a deed of bargain and sale, or a covenant to stand seized to uses to said Mrs. Adams, as he contends, in fee, and that Mrs. Adams and her husband, on the 12th October, 1855, gave a mortgage on this property, duly acknowledged to him, for \$6000. The validity of this mortgage is contested upon the admitted ground that at its date Mrs. Adams was a *feme covert* and under age.

First, what interest was conveyed to Ross by virtue of Mrs. Adams' execution of the mortgage?

There can be no doubt but that at the common law the deed of a married woman was absolutely void, so much so that she could plead to it *non est factum*. *Rake v. Lawshee*, 4 Zab. 613; *Moore v. Rake*, 2 Dutcher 577. It never was a case like mere infancy, where the title passed, but could be avoided by matters subsequent. Nor is this disability removed by the statute (Nix. Dig. 122, § 4) authorizing the acknowledgment of deeds by married women, because the power conferred by that act is, by its express terms, limited to *femes covert* over age.

But even supposing, as Mr. Ross contends, that this mortgage is not void, but only voidable, still she is represented by counsel claiming now here to avoid this mortgage. This is the first and only time and place she has had an opportunity so to do, and if not allowed now by us, the

right is gone forever. We think, by her coming forward on this occasion, and claiming the money at our hands, she, so far as her rights are concerned, avoids the mortgage, and that consequently Mr. Ross has no rights in this land by virtue of its execution by her.

Second. The next question is, what rights did Mr. Ross acquire by reason of Mr. Adams' execution of the mortgage?

Without inquiring now what was Mrs. Adams' interest in the land under the deed from Miss Traphagen, had Mr. Adams, at the date of the mortgage, any present right to the rents and profits, so as to entitle him to the interest of this money during the lifetime of his wife? The deed from Miss Traphagen is dated the 9th September, 1854. He would have been entitled to the rents and profits as husband during his life, if his wife's interest lasted so long, but for the operation of the act for the better securing of the property of married women, passed March 25th, 1852, Nix. Dig. 466. This act being in force when the deed was made by Miss Traphagen to Mrs. Adams, Mr. Adams' interest is subject to its operation.

Does this act so alter the common law as to take away from the husband all interest during his wife's life in lands conveyed to her by deed of bargain and sale, or by a covenant to stand seized to uses? The third section of this act, the only one applicable to the case before us, provides that "it shall be lawful for any married female to receive, by gift, grant, devise, or bequest, and hold to her sole and separate use, as if she were a single female, real and personal property, and the rents, issues, and profits thereof, and the same shall not be subject to the disposal of her husband, nor be liable to his debts." Mrs. Adams married, and acquired her interest in this land, *after* the passage of this statute, by a deed from Miss Traphagen, in consideration of natural love and affection and of one dollar.

This act applies only to land received by the wife by gift, grant, devise, or bequest.

This was certainly not a devise or bequest. The only question is, was this deed a gift or grant within the meaning of the legislature.

It is contended, by Mr. Ross, that the legislature intended to use the terms gift and grant in the strict technical sense, and that the conveyance here is one of bargain and sale, or a covenant to stand seized to uses, operating by virtue of the statute of uses, and not either a gift or grant.

But did the legislature intend to use these terms, *gift* or *grant*, in their narrowest technical sense? I think not, but to embrace in the terms gift and grant, devise or bequest, all the modes of acquiring property except, perhaps, by descent. This language is used by the legislature in 1852. Gift and grant had then long ceased to be understood, even by the profession, and in all ordinary instruments, even such as deeds, in their ancient technical meaning. In practice for many years, females as well as others had ceased receiving lands by the strict technical forms of gift or grant. It cannot be intended that the legislature meant to restrict the rights of married women to lands received in a mode which had fallen into disuse.

In the state of New York, the term grant had for many years, technically as well as in common language, included all modes of acquiring lands by deed or conveyance. It is true that there this was done by special statute. But still this had only the more strongly fixed this meaning in the public mind.

The Vermont statute provides, that any rights in real estate which a *feme covert* may acquire, by gift, grant, devise, or inheritance, during coverture, shall not be liable for the debts of the husband.

These words, gift or grant, came up for construction in the case of *Peck v. Walter*, 26 Verm. Rep. 85, wherein Redfield, Chief Justice, in delivering the opinion of the court, says: "It is very apparent that the statute was intended to embrace all rights in real estate which the wife shall acquire during coverture. It would be a very nice, and, as it appears to me, a very unintelligible construction of this statute to limit the word grant to its narrowest technical import. It evidently was intended to apply to all conveyances by deed which were not gifts." That case was, like the present, a mortgage of the wife's property by the husband, the wife not joining.

In our statute, by the term grant, the legislature intended all the ordinary modes of acquiring property by deed, whether operating by force of the statute of uses or not; that by long usage such had become not only the popular, but also the technical meaning of the term.

It follows, that at the time of the execution of this mortgage by Mr. Adams, he had no present interest in this land which he could convey.

The next question is, had Mr. Adams, when he executed this mortgage, any future or contingent interest which would pass by the mortgage, and give Mr. Ross any future interest in this money?

This depends upon whether Mr. Adams was tenant by the courtesy inchoate. There are children born of the marriage.

This brings us to the question, what estate Miss Adams had in this land by virtue of the deed from Miss Traphagen?

If she had only a life estate, then Mr. Adams never could be tenant by the courtesy, and consequently Mr. Ross never had any interest in this money. But if Mrs. Adams had an estate either in fee or in tail, then it is contended that, notwithstanding the act for the better security of married women, Mr. Adams was tenant by the courtesy initiate.

This deed is dated September 9th, 1854, and purports to be made between Miss Traphagen, party of the first part, and Catharine Adams, wife of Alonzo Adams, party of the second part, in consideration of natural love and affection and of one dollar, and to grant, bargain, sell, alien, remise, release, convey, and confirm unto the said party of the second part, for and during her natural life, and at her death to her children which may be begotten of her present husband, the said lots (describing them by numbers and bounds), together with all the appurtenances, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof, and also all the estate, right, title, interest, property, possession, claim, and demand whatsoever, as well in law as in equity, of the said party of the first part of, in, and to the same; to have and to hold the above described premises unto the said party of the second part for and during her natural life, and at her death to her children which may be begotten of her present husband, Alonzo Adams.

Then follows—1st. A covenant by Miss Traphagen, for herself and heirs, with the said party of the second part and her heirs and assigns, of seizin and of full power to convey in manner aforesaid.

2d. That the said party of the second part, her heirs and assigns, may at all times hereafter peaceably and quietly hold the premises without any let, suit, trouble, molestation, eviction, or disturbance of the said party of the first part, her heirs or assigns, or of any other person lawfully claiming.

3d. That they are free from encumbrance.

4th. That the said party of the first part and her heirs, and all persons claiming under them, shall and will, at any time or times hereafter, upon the request of the party of the second part, her heirs and assigns, make all such further conveyances for the better vesting and

confirming the said premises in and to the said party of the second part, her heirs and assigns forever, as by the said party of the second part, her heirs or assigns, shall be reasonably required.

5th. That the said Traphagen and her heirs, the said premises unto the said party of the second part, her heirs and assigns, against the said party of the first part and her heirs, and against all persons whomsoever lawfully claiming, shall and will warrant and forever defend.

Upon the construction of this deed, Mr. Ross contends that it conveys to Mrs. Adams either an estate in fee simple or in fee tail, and that he consequently is entitled, as representing Mr. Adams, to the interest of this money after her death during the life of Mr. Adams, if he survives her. It is contended, on behalf of Mrs. Adams, that the deed gives her a fee simple, and that she is entitled to all the money. It is contended, on behalf of the children of Mrs. Adams, that the deed gives her only a life estate, or at most a fee tail, and that they are entitled to the money after her death; and it is finally contended, by Miss Traphagen, that the deed only conveys a life estate to Mrs. Adams, and at most, after her death only, a life estate to her children, and that the money goes, after her and their deaths, back to Miss Traphagen.

Upon the construction of this deed, I am of opinion that the estate thereby conveyed to Mrs. Adams was a fee tail special, as if the language had been, to Mrs. Adams and the heirs of her body by her present husband to be begotten. That by the term children which may be begotten of her present husband, the grantor meant, and that the law will so construe it, heirs which may be begotten of her present husband.

No one can for a moment doubt, upon reading this deed, that it was the intent of the grantor that it should belong to Mrs. Adams during her life, and after her death absolutely to her children. Are we forced by any strict principles of law to defeat this intent? In the first place, suppose the deed had used the word heirs, instead of the word children, the deed would then have read to Mrs. Adams for and during her natural life, and at her death to her heirs which may be begotten of her present husband. It has never been a question, from the time of Shelly's case, that this would have given Mrs. Adams a fee tail special; that the words during her life, did not make it a life estate, or change the estate from what it would have been if the language had been to Mrs. Adams and to her heirs of her body by her present husband. Inserting

the words "during her life" gave her nothing more or less than she would have had without them.

Are we prohibited, by unyielding principles of law, from giving effect to what the whole document and the nature of the transaction shows to have been the intention of the grantor?

In the first place, the estate conveyed to Mrs. Adams is not a fee simple. The words of conveyance are, to Mrs. Adams during her natural life, and after her death to her children by her husband. This expressly limits the estate to less than a fee simple.

It is contended that, by the covenants, it is warranted to her and her heirs generally. But the covenants cannot be used to enlarge the estate. They only defend the estate granted, whatever that may be, except so far as the general warranty may operate by way of estoppel, of which we shall speak hereafter.

Nor is the estate granted changed by calling this conveyance a covenant to stand seized of uses. The covenant in this deed would have the same effect if we call it a covenant to stand seized to uses, as if we call it a bargain and sale. These covenants, if the conveyance is a covenant to stand seized to uses, would only warrant and defend the uses declared—they could not enlarge the uses. If we strike out of this conveyance the pecuniary consideration, it would then be technically a covenant to stand seized to uses; if we strike out the consideration of love and affection, it is then a deed of bargain and sale, and we may call it, as it is, either the one or the other, or both, as may best effect the intent of the parties. But the quantity of estate conveyed, in either case, must depend upon the operative words of conveyance or the declarations of the use, and not upon the covenant defending the quantity of estate conveyed.

The only remaining question is, does this conveyance give Mrs. Adams an estate for life or an estate in fee tail special?

If the deed, instead of saying to Mrs. Adams during her natural life, and after her death to her children by her present husband, had said to Mrs. Adams during her natural life, and at her death to her heirs by her present husband, there can be no doubt but that her estate would have been a fee tail special. The whole difficulty arises from using in the terms of grant the word children, instead of the word heirs.

It is contended, in behalf of the children, that although the grantor used the word children, yet that she by that term meant heirs, and that

the legal construction of the deed is to read it as if she had used that term.

1st. By the term children, did she mean heirs?

In the first place, under our statute of descents, the term children by her present husband, is identical in legal effect with the term heirs of her body by her present husband, and designates the same objects. It is not here as it would be under the law of primogeniture, where the oldest male only would be heir. Her heirs by her present husband must be her children, and her children must be her heirs. In the next place, the children are not parties to the deed. They had not then yet been born.

In the next place, although the covenants cannot be used to enlarge the estate, yet they may be used to show in what sense the words in the conveying part of the deed were intended.

From these covenants it is demonstrated that, by the term children by her present husband, the grantor intended the heirs of her body by her present husband.

Thus the grantor covenants that the party of the second part and her heirs shall at all times hereafter peaceably occupy and hold the premises. She could not intend, by this covenant, that heirs generally should enjoy it, but only those who would take under the operative words of conveyance, and that she used the words children by her present husband for, and really meant by it, the heirs of her body by her present husband. So also as to the covenant for other assurance; so also with respect to the clause of general warranty.

The covenants are intended not to enlarge but to defend the quantity of estate conveyed. The covenants have reference, consequently, to the words of conveyance, and they are to be construed together. By the term children, in the conveying part, she includes certain heirs, and by the term heirs, in the covenants, those heirs which are children by her present husband. By the covenants she defends the estate to all the heirs in terms, but which heirs she meant is defined in the conveying clause to be children by her present husband.

The very nature of the transaction shows that it could not have been the intent that, if Mrs. Adams had children by her present husband, the property should revert, at the deaths of those children at some remote period, to Miss Traphagen, but that, under our statute regu-

lating estates tail, the property would vest in the children in fee immediately at their birth.

Such being the undoubted intention of the grantor, are we forced to defeat this intent, and say that the term children was only intended to be a *designatio personæ*?

There can be no doubt if this had been a will, and it had appeared by the context clearly that the testator by the term children meant heirs, that the courts would have given effect to the intention.

Is it otherwise with respect to deeds?

2 Blackstone 107, says the word "heirs" is necessary in a grant or donation in order to make a fee or inheritance. For if land be given to a man forever, or to him and his assigns forever, this vests in him but an estate for life. This very great nicety about the insertion of the word heirs is a relic of feudal strictness, by which it was required that the form of the donation should be strictly preserved. The personal abilities of the donee were originally supposed to be the only inducement to the gift, and subsisted only for the life of the donee, unless the contrary were clearly expressed. But this rule is now softened by many exceptions.

The reasons of the rule have long since ceased, and with it also ought to cease the law. Conveyances have long since ceased to be looked upon as gifts.

But it is apparent from the passage, that by it was not meant that there existed any magic in the word heirs or in the sound represented by that combination of letters. Otherwise no deed in a foreign language could convey a fee. But the writer merely means to say, that in a grant to make a fee the grantor must use language by which it appears that he meant to include the line of inheritance, of which the word heirs was the most apt and well-defined expression. But he does not intend to say that any other language, by which it clearly appears that the grantor intended to embrace the line of inheritance in the grant, will not pass a fee.

If the word heirs is used, that *prima facie* carries the fee, unless the contrary expressly appears; if the term children is used, it must clearly appear from the instrument that the grantor did not mean by that term certain individuals, but the same thing as heirs or the entire line of descent. But the term children, like the Latin *hæres*, or any term in a foreign language, is capable of translation, and the grantor

has the right in the instrument creating the grant to translate his own language. It is a question of translation.

The rule is, that it must appear upon the face of the instrument that the grantor intends to pass the inheritance, which may be done best by the term heirs, but may be equally done by any sound or word or phrase which the instrument shows the grantor used as a synonym for it. Thus the word successors, in a grant of land to a sole corporation, carries the fee, because it shows the intention of the grantor to convey the inheritance.

Thus Mr. Hays, in his principles for expounding dispositions of real estate, 7 Law Library 77, remarks: "That the rules of construction freely permit the use of the words heirs of the body or issue in the limited sense of children, and the word children in the comprehensive sense of the words 'heirs of the body.' Those rules, or rather the fundamental principles of legal interpretation, require only a clear explanation to justify a departure from the ordinary meaning, imposing on those who would translate the term the *onus* of producing an express warrant under the hand of the author of the gift."

So in his 8th proposition, developing the principles on which the construction of gifts to heirs special depend, the same author remarks: "It is immaterial, with reference to the preceding propositions, whether their heirs special are described under the technical denomination of heirs of the body, or under the informal denomination of heir of the body, issue, descendants, son, sons, children, for all these may be used as synonymous with heirs in tail, or any other term apparently designed to comprehend the whole line of succession." The rule does not speak of the word heirs abstractedly, nor suppose any special virtue to reside in that word; but when, by the application of the ordinary rules of interpretation, the testator is found to have used a term which, though properly a word of purchase, or of an ambiguous character, yet, taken in connection with the context, is of as large import as heirs of the body standing unexplained, it follows that he has indicated that course and mode of succession which the writers on the rule have so anxiously marked as attracting and requiring its application.

2 Preston on Estates 1, says: "To the creation of an estate in fee by deed, it is requisite that the land should be limited to an individual and his heirs, but that many exceptions are to be noticed. Thus, the word heirs need not be in the grant at all, as where one grants land to an-

other as fully as they were granted to him; or where one enfeoffs another, and it is re-enfeoffed in the following language: you have given me these lands; as fully as you have given them to me, I assure them to you." These authorities show that the fee passes not because the word heir is in the deed, but because it appears by reference that it was the intention of the grantor to include the whole line of descent in the grant.

So in p. 7, the same author, quoting 3 Buls. 128, remarks: "It will be sufficient that it should appear from the context that the grantee and his heirs are to have the benefit of the grant. Thus, where a grant was of rent to A., and afterwards that he and his heirs should distrain for it, this limitation of distress enlarged the estate, and made it a fee simple."

So in p. 47, speaking of estates tail, he says: "Words of reference will be sufficient to create an estate tail, therefore a gift to A. and the heirs of his body, remainder to B., in *eadem forma*, gives B. an estate tail. So where a gift is made in frank marriage." Again, the author says, an estate tail even in a deed may, contrary to the general rule of law, arise from necessary implication. Thus, a gift to a man without any limitation to his heirs, but with a provision that the land shall revert to the donor, or remain to another if the donee shall die without heirs of his body, will afford ground for the construction that the donee is to have the land to him and the heirs of his body, because the land is not to revert or remain over until there shall be a failure of these heirs. And as Perkins, and, after him, Chief Justice Holt, states the reason to be *quod voluntas donatoris secundam formam in carta doni sui manifeste expressa de cetero observetur*. The true reason is, that the intent of the donor appeared in express words in the deed, and the implication was a necessary one. Again, in page 484, the author says: It is sufficient in creating an estate tail that the words of the clause of limitation, or *some part of the deed that refers to the clause or explains it*, or a reference by this clause to some other part of the same deed, or even to a distinct instrument, should confine the gift to the heirs of the body of the donee. It is not by the rule of law prescribed that the qualification of the gift should, in direct words or by express terms, be in the immediate clause of the gift to the donee. All that is required is that, by the frame and context of the deed, the gift should be restrained to the heirs of the body, and not extended to the heirs generally. The point depends on the rule, that all the clauses included are

to be taken into consideration together, and construction made on the several parts. The entire instrument must be construed by its parts, so that every clause, and every word in every clause, may have effect. Whenever it is to be collected in construction on the clause of immediate gift, or from a clause which introduces the limitation of another estate, or refers to another part of the same instrument, or to another instrument, that the gift under consideration is not to extend the benefit of the limitation to any heirs besides those which are of the body of the devisee, the word heirs will be restrained to mean heirs of the body.

Now, construing this deed upon these principles, is it not apparent, and a necessary implication from the different clauses of the deed itself, first, that it was the intention to grant an estate to Mrs. Adams and her heirs, and in the second place, that those heirs were the heirs of her body by her present husband?

Take, for instance, the second covenant: the grantor therein, for herself and her heirs, covenants with Mrs. Adams and her heirs that the party of the second part and her heirs shall forever quietly hold the premises. And so of the other covenants.

As the covenant is only intended to defend the estate granted, is it not a necessary implication that the grantor intended to use in the granting clause words that would create in the grantee an estate of inheritance, and the object of the covenant was to defend that inheritance? The words in the granting clause and in the covenant have direct reference to each other, and mutually translate each other. The children by her husband were her heirs.

Using the term heirs in the covenant shows that by children, in the granting clause, was intended heirs, and the term children, in the granting clause, shows that by the term heirs, in the covenant, was intended heirs of her body by her present husband.

In the case of *Parkman v. Bowdoin*, 1 Sumner's Rep. 359, the language of the will was, "I give the land to my son James and his lawful begotten children in fee simple forever; but in case he should die without children lawfully begotten, to my son A. and to his lawfully begotten children in fee simple forever." At the time of making this will James had no children. It was held that James took an estate tail. Judge Story, in giving his opinion, says the devise must be construed as meaning heirs of the body.

Numerous cases are referred to by him where children in devises have been construed to mean heirs of the body. It is true that these are cases of devises, but I cite them as showing that, in legal language, children may be construed as meaning heirs of the body. Here the term children is defined and demonstrated by the covenants to mean heirs of the body, by necessary implication from the covenants and by the direct reference of the covenants to the words of grant. Even if the word heirs must be in a deed, no authority prescribes that they can be only in the granting clause. The whole deed and all its parts are to be construed together to give to the term heirs, wherever found in the instrument, their proper force.

In *Mills v. Carter*, 22 Verm. Rep. 104, the court remarks, that though it may be true that the covenants in a deed may not enlarge the estate, yet when it becomes a question of construction as to what is granted, they may well be resorted to to help the construction, and this upon the principle, that reference is to be had to the whole deed, and that every part is to have operation, if possible.

But again, in *Terrill v. Taylor*, 9 Cranch 57, Story, in delivering the opinion of the court, says, the present deed did not operate by way of grant to convey the fee; for the term heirs is not in the deed, but the covenant of general warranty binding the grantors and their heirs, and warranting the land to the church wardens and their successors forever (who could not hold lands) may well operate by way of estoppel to confirm to the church and its grantees the beneficial estate in the land.

The case of *Shaw v. Galbraith*, 7 Barr. 111, was one upon a deed like the present, without words of inheritance in the granting clause, but containing the clause of general warranty to the grantee, his heirs and assigns. The court, in delivering their opinion, say, that without undertaking to determine whether the fee simple is transferred, we are of opinion the grantor is estopped from denying the title.

It is well settled that a general warranty operating by estoppel passes the estate. If this be so, the general warranty in this deed passed the estate by virtue of the term heirs in a covenant to Mrs. Adams and her heirs. But what heirs? Not her heirs general, for that would be against the express language of the clause and grant, but by every rule of construction the term heirs, in the covenant, would be limited to those heirs named in the granting clause, to wit, her children by her present husband. The heirs named in the covenant must mean and be

restricted to the heirs of her body by her present husband, and this would give a fee tail special to Mrs. Adams.

I confess myself at a loss to put any other construction upon this deed. If we call the estate of Mrs. Adams a fee simple, we must reject the words during her life, and after her death to her children, in fact the whole clause of conveyance; if we call it a life estate, we must strike out the word heirs in all the covenants. But if we decide that the covenants and the clause of conveyance refer to, explain, and construe each other, and that the estate is a fee tail, all its parts harmonize, and the intention of the instrument manifestly carried out, the wife gets her life estate, the husband his inchoate courtesy, and the children the inheritance.

It was urged, upon the argument in behalf of Mr. Ross, that Mrs. Adams, under this deed, had the fee simple; but in the view we have taken of the case, this inquiry is immaterial as regards him, as he takes precisely the same interest whether Mrs. Adams has an estate in fee or in tail, he being in either case tenant by the courtesy initiate.

But the question becomes material as between Mrs. Adams, her children, and Miss Traphagen.

It was contended, on behalf of Mrs. Adams, that the deed gave her a fee simple, because this was void as to the children on account of its being a deed of bargain and sale, and they not being in existence at the date of the deed, and so no pecuniary consideration could move from them, and the clause of conveyance gave it to her during her natural life, and also all the remainders and reversions, and that she takes all after her life as a remainder. But these terms are no broader than to say, to her forever. It would still be but a life estate for want of words of inheritance.

It is contended, in behalf of Miss Traphagen, that considering this deed as one of bargain and sale, Mrs. Adams has only a life estate, and the children of Mrs. Adams take as purchasers; and that as none of them were born at the date of the deed, it is void, as to them, for want of consideration moving from them. But if we are right in the conclusion, that under this deed the estate of Mrs. Adams is a fee tail special, then this question cannot arise, because then the children would hold by descent, and not as purchasers.

Again, it is said, by Miss Traphagen, that considering this deed as a covenant to stand seized to uses, it, in the first place, is void entirely, be-

cause Mrs. Adams was too remotely connected to raise the consideration of blood or marriage. However this may be, this deed is undoubtedly good as a deed of bargain and sale, and if by it a fee tail is vested in Mrs. Adams, it makes no difference whether it will operate as a covenant to stand seized.

Upon the whole case, then, we conclude that this deed is a conveyance whereby the grantee, Mrs. Adams, became seized in law of such an estate in the lands thereby conveyed as under the statute of 13th Edward the first, called the statute of entail, is an estate in fee tail, and that consequently upon her death, under our statute (Nix. Dig. 196, § 11), the lands go to and will be vested in the children of Mr. Adams in fee.

One more question is raised by Miss Traphagen. She contends that all the issue of Mrs. Adams may die before their mother, and that in that event the reversion is in her. But it appears, by the case, that Mrs. Adams had children before this land was condemned for the railroad company. This section of the act provides that upon the death of the tenant in tail the lands shall go to and be vested in the children of such grantee, and if any child be dead, the part which would come to him or her shall go to his or her issue in like manner. This language is identical with that of the 10th section of the same act, providing in case any lands shall hereafter be devised to any person for life, and at his death to go to his heirs, then upon the death of his devisee the lands shall go to and be vested in the children of such devisee in fee, and if any child be dead, the part which would come to him to go to his issue.

The question is whether, under the language of these sections, the estate of the children vest at their birth or at the death of the parent. The language of the 10th section has received the judicial construction by the Court of Appeals of this State in the case of *Den v. Hopper*, 2 Zab. 599, wherein that court decided that, within the 10th section, the children took vested estates at their birth, subject to be defeated only so far as to let in subsequently born children. I can see no difference, in this respect, between the two sections, and think the decision in *Den v. Hopper* controls this question.

This follows from what we have said, that by the deed in question, Mrs. Adams is entitled to the use of the land during her natural life without the interference of her husband; that after her death her husband, if he survives her, will be tenant by the courtesy, and that the bal-

ance of the interest on the lands belongs absolutely in fee to Mrs. Adams' children.

The money is in court, and it is our duty to pay it out, as nearly as may be, as if it were the land itself. I know of no better way than to let the value of Mrs. Adams' interest be calculated by the clerk, and said amount paid over to her. The same as respects Mr. Adams' interest, and the amount paid over to Mr. Ross. That the balance be invested under the supervision of the clerk, and the interest paid annually to the guardian of the children of Mr. Adams until the further order of this court.

An order was made conforming to the views of the court, and thereupon a writ of error was brought by Ross and Traphagen to remove the order into this court for revision.

The cause was argued at February term, 1860.

For the plaintiff in error, *A. O. Zabriskie*.

For the defendant, *J. P. Bradley*.

At June term, 1860, the following opinion was read by

WHELPLEY J.—This writ of error brings up for review the judgment of the Supreme Court, giving a construction to a deed, dated the 9th of September, 1854, between Anna V. Traphagen, of the first part, and Catharine Ann V. B. Adams, wife of Alonzo Whitney Adams, of the second part, by which the grantor, in consideration of natural love and affection and of one dollar, conveyed to the grantee the premises in the deed described. The operative words are grant, bargain, sell, alien, remise, release, convey, and confirm unto the said party of the second part, for and during her natural life, and at her death to her children which may be begotten of her present husband: to have and to hold the above described premises unto the said party of the second part for and during her natural life, and at her death to her children which may be begotten of her present husband, Alonzo W. Adams.

The deed contains covenants of seizin, for quiet enjoyment, against encumbrances, for further assurance and of warranty.

These covenants are made by the grantor for herself and her heirs with the party of the second part, her heirs and assigns.

Mrs. Adams, at the date of the conveyance to her, was a minor. On the 12th October, 1855, she, with her husband, executed a mortgage to secure the payment of \$6000, in one year from date, upon the premises conveyed to her. She was then nineteen. The mortgage was to Ross, the applicant in the Supreme Court.

The Erie Railway Company, under the provisions of an act of the legislature, took a part of the land in question, and hold it in fee simple. The value of the land taken has been ascertained at \$3061; that is now in the Supreme Court, to be awarded to the parties entitled to it, and who they are must depend upon the true construction of the deed.

What, then, are the rights of Mrs. Adams, her husband and children, one having been born of the marriage since the conveyance; and what, if any, are the rights of Ross, the mortgagee, to the money in court?

The Supreme Court held, that the estate granted by the deed was an estate in fee tail special in Catharine Adams and the heirs of her body by her present husband; that her husband was entitled to courtesy; that the mortgage to Ross on the interest of Mrs. Adams was void as to her, but was a lien upon the estate of her husband, in case he survived her.

This decision was reached by interpreting the word "children," in the deed, as equivalent "to heirs," calling in the covenants in aid of that interpretation, as throwing light upon what the court called the intention of the grantor.

The Supreme Court was right in holding the first estate conveyed to Mrs. Adams not a fee simple; the express limitation of the estate to her during life, and after her death to her children, forbade any other conclusion. The covenant, warranting the land to her and her heirs general, cannot enlarge the estate, nor pass by estoppel a greater estate than that expressly conveyed. A party cannot be estopped by a deed, or the covenants contained in it, from setting up that a fee simple did not pass, when the deed expressly shows on its face exactly what estate did pass, and that it was less than a fee. *Rawle on Cov. for title* 420; *Blanchard v. Brook*, 12 Pick. 67; 2 Co. Lit. 385, b.

Lord Coke expressly says: but a warranty of itself cannot enlarge an estate; as if the lessor by deed release to his lessee *for life*, and warrant the land to the lessee and his heirs; yet doth not this enlarge his estate.

Justice Vredenburgh, in his opinion, admits this to be law. He

says, although the covenants cannot be used to enlarge the estate, yet they may be used to show in what sense the words in the conveying part of the deed were used. What is that but enlarging what would otherwise be their meaning? If without explanation they are insufficient to pass the estate, does not the explanation enlarge their operation?

The learned judge, in his elaborate opinion, says: from these covenants, it is demonstrated that, by the terms children by her present husband, the grantor intended the heirs of her body by her present husband. It follows, from this argument, that although the conveying part of the deed may not contain sufficient to convey the estate as a fee simple, for example, yet that if the covenants show an intent to pass a fee simple, it will pass.

The argument is, that the words of conveyance and covenant must be construed together. If the covenants look to the larger estate, that will pass upon the intent indicated. Children are said to be equivalent to heirs, because she warranted to her heirs; and the heirs are said to be not heirs general, because she called them children.

The inconsistency between the conveyance and covenant shows mistake in the one or the other. The safest rule of construction is that propounded by the Supreme Court; that the quantity of the estate conveyed must depend upon the operative words of conveyance, and not upon the covenants defending the quantity of estate conveyed.

Starting with that premise, it seems difficult, nay impossible, to reach the conclusion, that the covenants are to be looked to in the interpretation of the conveyance, as such.

The covenants only attach to the estate granted, or purporting to be granted. If a life estate only be expressly conveyed, the covenantor warrants nothing more. The conveyance is the principal, the covenant the incident. If they do not expressly enlarge the estate passed by the operative words of the deed, I cannot perceive upon what sound principle of construction they can have that effect indirectly by throwing light on the intention of the grantor. In the construction of a deed of conveyance the question is, not what estate did the grantor intend to pass, but what did he pass by apt and proper words. If he has failed to use the proper words, no expression of intent, no amount of recital, showing the intention, will supply the omission, although it may preserve the rights of the party under the covenant for further assurance or in equity upon a bill to reform the deed.

The object of the covenants of a deed is to defend the estate passed, not to enlarge or narrow it. To adopt, as a settled rule of interpretation, that deeds are to be construed like wills, according to the presumed intent of the parties making them, to be deduced from an examination of the whole instrument, would be dangerous, and, in my judgment, in the last degree inexpedient. It is far better to adhere to the rigid rules established and firmly settled for centuries, than to open so wide a door for litigation, and render uncertain the titles to lands. The experience of courts in the construction of wills, the difficulty in getting at the real intent of the party, where imperfectly expressed, or where he had none; the doubt which always exists in such cases, whether the court has spelt out what the party meant, all combine to show the importance of adhering to the rule, that the grantor of a deed must express his intent by the use of the necessary words of conveyances, as they have been settled long ago by judicial decision and the writings of the sages of the law. Upon this point, it is not safe to yield an inch; if that is done, the rule is effectually broken down. Where shall we stop if we start here?

Littleton says: tenant in fee simple is he which hath lands or tenements to hold to him and his heirs forever. For if a man would purchase lands or tenements in fee simple, it behooveth him to have these words in his purchase: "to have and hold to him and his heirs." For these words, "his heirs," make the estate of inheritance. For if a man would purchase lands by these words, "to have and to hold to him forever," or by these words "to have and to hold to him and his assigns forever," in these two cases he hath but an estate for life, for that there lack these words, "his heirs," which words only make an estate of inheritance in all feoffments and grants.

"These words, 'his heires,' doe not only extend to his immediate heires, but to his heires remote and most remote, born and to be born, *sub quibus vocabulis 'hæredibus suis' omnes hæredes, propinqui comprehenduntur, et remoti, nati et nascituri*, and *hæredum appellatione veniunt, hæredes hæredum in infinitum*. And the reason wherefore the law is so precise to prescribe certaine words to create an estate of inheritance, is for avoiding of uncertainty, the mother of contention and confusion." Co. Lit., vol. 1, 1 *a*, 8 *b*; 1 Shep. Touch. 101; Com. Dig., tit. Estate A, 2; Preston on Est. 1, 2, 4, 5; 4 Cruise's Dig., tit. 32, c. 21, c. 1.

There are but two or three exceptions to this rule. The cases of sole

and aggregate corporations, and where words of reference are used "as fully as he enfeoffed me." A gift in frank marriage, etc., which are to be found stated in the authorities already cited.

These exceptions create no confusion ; they are as clearly defined and limited as the rule itself.

The word "heirs" is as necessary in the creation of an estate tail as a fee simple. 1 Co. Lit. 20, *a* ; 4 Cruise's Dig., tit. 32, *c.* 22, § 11 ; 4 Kent's Com. 6 ; 2 Bl. Com. 114.

This author sets this doctrine in clear light. He says : As the word heirs is necessary to create a fee, so, in further limitation of the strictness of feodal donation, the word body or some other word of procreation, is necessary to make it a fee tail. If, therefore, the words of inheritance or words of procreation be omitted, albeit the other words are inserted in the grant, this will not make an estate tail, as if the grant be to a man, and *his issue* of her body, to a man and *his seed*, to a man and *his children* or *offspring*, all these are only estates for life, there wanting the words of inheritance.

The rule in Shelley's case, that when the ancestor, by any gift or conveyance, takes an estate of freehold, and in the same gift or conveyance an estate is limited either immediately or mediately to his heirs in fee or in tail, that always in such cases the word heirs are words of limitation, and not of purchase, 1 Rep. 93 ; 4 Cruise's Dig., *c.* 23, § 3, tit. 32, requires the use of the word heirs to bring it in operation.

No circumlocution has been ever held sufficient. It is believed no case can be found where this rule has been held to apply, unless the word heirs has been used in the second limitation.

Neither the researches of the learned judge who delivered the opinion of the Supreme Court, nor those of the very diligent counsel who argued the case here, have produced a case decided in England or in any State of this Union abiding by the common law, where, in a conveyance by deed, the word children has been held to be equivalent to heirs. That this has been determined in regard to wills is freely conceded, but that does not answer the requisition. The reasoning of the Supreme Court is, to my mind, entirely unsatisfactory. In the administration of the law of real estate, I prefer to stand *super antiquas vias, stare decisis* ; to maintain the great rules of property, to adopt no new dogma, however convenient it may seem to be. The refined course of reasoning adopted in the face of so great a weight of authority rather shows what the law might have been, than what it is.

I am utterly unprepared to overturn the common law, as understood by Littleton, Coke, Shepherd, Cruise, Blackstone, Kent, and all the judges who have administered it for three centuries, and to adopt the dogma, that intention, not expression, is hereafter to be the guide in the construction of deeds. That would be as unwarrantable as dangerous.

Under this deed, Mrs. Adams took an estate for life, which was not enlarged by the subsequent limitation to a fee tail. The remainder vested in Anna Adams, the child of the marriage, for life, subject to open and let in afterborn children to the same estate.

The deed operated as a covenant to stand seized. The proper and technical words of such a conveyance are, stand seized to the use of, etc.; but any other words will have the same effect, if it appear to have been the intention of the parties to use them for that purpose. The words bargain and sell, give, grant, and confirm, have been allowed so to operate. 4 Cruise, tit. 32, c. 10, § 1, 2.

By such a covenant, an estate may be limited to a person not *in esse*, if within the considerations of blood or marriage. Fearne on Rem. 288; 1 Rep. 154, *a*; 1 Preston on Est. 172, 176; 4 T. Rep. 39, *Doe v. Martin*.

This deed, on the face of it, expresses the considerations of natural love and affection, as well as the money consideration of one dollar.

It follows, from these considerations, that Adams is not entitled to courtesy in the lands on surviving his wife. The mortgage to Ross created no valid charge on the estate against Mrs. Adams, she being a minor when it was executed.

Mrs. Adams' interest in the land was subject to the provisions of the act for the better securing the property of married women, passed March 25th, 1852; the deed to her was after this act passed.

This was clearly a gift or grant, within the meaning of the act. The legislature did not intend to limit the benefits of the act to property conveyed by a deed operating as a gift or grant; all the ordinary modes of acquiring property by deed were intended by the use of the terms gift, grant. The reasoning of Justice Vredenburg upon this point is conclusive. Upon the determination of the respective life estates, the land reverts to Miss Traphagen.

The judgment of the Supreme Court must be reversed. The money in court must be invested for the benefit of Mrs. Adams for life, and after her death for the benefit of the surviving children of the mar-

riage, in equal shares, during their respective lives, and at their deaths respectively; their several shares must be paid to Miss Traphagen, or if she be then dead, to her heirs or devisees.

Judges COMBS, GREEN, RISLEY, VAN DYKE, WOOD, CORNELISON, HAINES, and SWAIN concurred in reversing the order of the Supreme Court.

For affirming—None.

Whereupon the following order or judgment was entered:

“This cause having been argued at the last term of this court, by the counsel of both parties, upon the reasons assigned for reversal, and the court having inspected the record and proceedings, and duly considered the same, and being of opinion that the deed executed by Anna V. Traphagen to Catharine Ann V. B. Adams for the lands out of which the sum paid into court arose, conveyed to the said Catharine Ann V. B. Adams an estate for life only, and that her husband, Alonzo W. Adams, is not entitled to any courtesy or any other estate therein; and that, after the death of the said Catharine Ann V. B. Adams the same would go to the children begotten of her body by her husband, Alonzo W. Adams, equally to be divided, if more than one, for the life of each of said children respectively, and that the reversion thereof remains in the said Anna V. Traphagen: it is ordered, adjudged, and decreed, that the judgment of the said Supreme Court be reversed, set aside, and for nothing holden; and that the record be remitted to the Supreme Court, with directions to cause the sum paid into court to be invested under the control and direction of said court, and that the interest thereof, during the life of the said Catharine Ann V. B. Adams, be paid to her for her separate use, and at her death be paid to her children begotten on her by her husband, Alonzo W. Adams, in equal shares, if more than one, for their respective lives, and at the death of such children, respectively, the principal sum be paid to the said Anna V. Traphagen. On motion of A. O. Zabriskie, of counsel with plaintiffs in error.”

CLAYTON v. CLAYTON.

● *Supreme Court of Pennsylvania, July 22, 1811.*

[Reported in 3 Binney 476.]

IN ERROR.

The testator devised "unto S. E. the granddaughter of his sister, and to her children, the *plantation* they then lived upon, for the use of her the said S. E. during her life, and immediately after her decease, to be equally divided among the surviving children of her the said S. E." He gave a legacy of £10 to his heir at law, and £40 to each of the children of his heir. *Held* that the children of S. E. took but an estate for life.

In ejectment in the Common Pleas of Bucks, by John Clayton the plaintiff below, judgment was entered in his favor upon the following case, which by agreement was brought up by writ of error.

Richard Clayton deceased, being seized in fee of a tract of land containing five hundred acres in the township of Southampton in the county of Bucks, of which the lands in the declaration are part, on the 15th of November 1770 made his last will and testament bearing date the same day and year, and afterwards on the 16th of the same month and year, duly made a codicil thereto, by which will he devised as follows: "I give unto my nephew Richard Clayton, the son of my brother John Clayton, ten pounds lawful money aforesaid. I give unto the children of the said Richard Clayton by his wife, each and every one of them, £40 lawful money aforesaid, to be put out to interest by my executors for their use until they respectively arrive to the age of twenty-one years. *I give and bequeath unto Sarah Evans, wife of James Evans, and granddaughter of my sister Margaret Jones, and to her children, the plantation they now live upon, being the same tract of land I bought of Jacob Jones, containing one hundred and seventy-one acres, for the use of her the said Sarah Evans during her life, and immediately after her decease to be equally divided among the surviving children of her the said Sarah Evans.*"

The codicil contained the following clause. "As for and concerning the plantation I have bequeathed unto Sarah Evans, wife of James Evans, for the benefit of her the said Sarah Evans and her children,

my will is that the timber thereof shall be preserved, and not destroyed by any person or persons whatsoever, firewood and fencing, being for the use of the said plantation, excepted."

The testator died seized in the same month, without cancelling or altering the said will or codicil.

Sarah Evans, in the said will named, had at the time of the making thereof, lawful issue five children living, to wit, Richard, Enoch, James, Sarah, and Elizabeth, who afterwards intermarried with Jonathan Clayton, Jr., *the defendant*. After the death of the testator, the said Sarah Evans entered and was possessed, and after residing thereon for some years, died in possession during the lifetime of her said five children, who immediately after her death entered and were possessed. Shortly after, to wit, in June, 1789, Sarah the daughter of the said Sarah Evans died intestate and without issue, and on the 3d of August, 1793, the four surviving children, to wit, Richard, Enoch, James, and Elizabeth with her husband, Jonathan Clayton, Jr., by deeds mutually executed, made partition among themselves of the said plantation, by which, a tract of twenty-nine acres thirteen perches, was released and confirmed to Jonathan Clayton, Jr., and Elizabeth his wife, and the heirs of Elizabeth, as her purpart. The lands in the declaration are a part of this tract. Jonathan Clayton and Elizabeth his wife entered and were possessed, and in the month of May, 1809, Elizabeth died leaving lawful issue.

Richard Clayton the testator died without issue; but in his lifetime he had an only brother, John Clayton, who died before him, leaving lawful issue Richard his son and heir at law, who survived the testator, and was also his heir at law and a legatee in the said will of *ten pounds*. The said Richard the second, afterwards in the year 1772, died, leaving lawful issue John Clayton his eldest son, *the plaintiff*, Jane, Elizabeth, Hannah, Rachel, and Dorothy, daughters. On the 18th of August, 1809, and prior to the commencement of this suit, the plaintiff made an actual entry in the lands in the declaration mentioned, claiming them as heir at law to his great uncle Richard the testator; and cut off a small ash tree, and left notice of the entry, &c., with the defendant.

The defendant is in possession of the lands in the declaration mentioned.

The question for the opinion of the Court, is whether the children of Sarah Evans took an estate in fee simple, or only an estate for life.

If for life, then judgment to be entered for the plaintiff, if in fee simple, then for the defendant.

Dick for the plaintiff in error, argued in favor of a fee simple, which he said the testator intended to give to the children of Sarah Evans, as was obvious from many circumstances in the will. The governing rule in the interpretation of wills is the intention of the testator. *He is regarded by the law as *inops consilii*; as wholly unacquainted with technical language; as not at all versed in the artificial limitations of estates; and therefore with infinite propriety it exempts him from the necessity of doing more than plainly expressing his meaning, which if not contrary to the rules of law, it will uniformly execute. Nay, for the purpose of ascertaining this meaning, even where it is not plain upon first view, courts will sift the entire will, and will understand its language, not as lawyers, but as ordinary men. Wood's Inst. 299; Shep. Touch. 434; 2 Black. Comm. 381, note 12; *Holmes v. Maywill*, 2 Show. 137; *Strong v. Cummin*, 2 Bur. 770; *Brownsword v. Edwards*, 2 Ves. 247; *Frogmorton v. Holyday*, 3 Burr. 1622; *Bridgwater v. Bolton*, 2 Salk. 267; *Grayson v. Atkinson*, 1 Wils. 334; *Bowes v. Blackett*, Cowp. 238; *Cowper v. Cowper*, 2 P. Wms. 741; *Ginger v. White*, Willes 350; *Kennon v. M'Roberts*, 1 Wash. 99; *Shermer v. Shermer's Executors*, 1 Wash. 271; *Minnis v. Aylett*, 1 Wash. 302; *Roy v. Garnett*, 2 Wash. 31; *Lambert v. Paine*, 3 Cranch 129. It is the remark of Judge Johnson, in the last cited case, that the fair presumption generally is, that he who enters upon making a will, intends to make a full distribution of everything he possesses; and in the present case, where there is no residuary clause, and where the testator has throughout spoken the common language, another presumption is equally fair, that he intended to make a distribution of everything among the persons he named, and did not expect that any latent interest was to spring up at a distant day for the benefit of any one whom he did not name. At the date of the will, Richard Clayton was his heir at law, to whom he gave £10, and to his children £40 each. Is it not perfectly clear to every mind that he did not intend to give them more? It is true that Lord Mansfield in *Hogan v. Jackson*, Cowp. 307, says this circumstance *alone* will not exclude the heir; but he admits it to have great weight in that case, and coupled with others in this, it ought to be conclusive. Among other circumstances with which it may be connected, is the limitation to Sarah

Evans for *life*, which is not carried over to the devise to the children. If it is to be generally presumed that a testator intends to give the whole, how much more, when he has first created a life estate out of a plantation to the parent, and upon her death gives it to her children. Ordinary men do not think of creating successive life estates out of the same fee. Another circumstance is the division which he directs to be immediately made among the *surviving* children after the death of their mother. The survivorship, and the division are both striking features. It is very like *Rose v. Hill*, 3 Burr. 1881. The case however which is most directly in point is *Wigfall v. Brydon*, 3 Burr. 1895. It was a devise of real estate to A for life, and after his death to B for life, and after the death of B to the children of the testatrix's cousin C and D, or such of them as should then be living, share and share alike; and if it should happen that B should not be living at the death of A, then that property should *be divided amongst the said children* as aforesaid. Lord Mansfield said that the estate was given to A expressly for life, and so to B. If the testatrix had *meant* the like to the children she would have *done* the like. Besides she directed the property to be *divided* amongst seven children, that is, she intended the value to be divided among them, and therefore meant a fee. It is not necessary that there should be either words of limitation annexed to the devise, or even words indicating the quantity of an estate, to convey a fee. In *Moone v. Heaseman*, Willes 138, there was neither. The testator gave all his lands in Cowfold to his sister for life, and after her decease to her daughter S., paying to each of her sisters E. and M. £500 apiece; and if either of them should die, the survivor was to take the legacy, and if S. should die, the testator willed *that the farm should be divided* between the survivors. The court held that E. and M. were to take a fee in the event mentioned, and Willes Chief Justice evidently questioned *Pettywood v. Cooke*, Cro. Eliz. 52, where the contrary had been ruled. *Goodright v. Allin*, 2 W. Black. 1042, confirms *Moone v. Heaseman*. The case of *French v. M'Ilhenny*, 2 Binn. 13, seems indeed to conclude this case. The peculiar features of that will exist in this, and in this is one which did not exist there, the legacy to the heir at law. Nothing but a technical construction can raise a difficulty; and it is this halting between a strict artificial interpretation of wills, and a liberal understanding of their terms as unlearned men would use and understand them, that the confusion in the construction of wills has arisen. The only way to avoid

it, is to adopt and execute the intention, without regard to technical language.

Condy and *T. Ross* for the defendant in error. We admit that the intention must govern, but it must be a plain intention; not such as the private conjectures of a judge may raise, but such as no enlightened mind can escape from. Whatever the law lays down as a rule of real property, is a just rule; the party holds and gives it according to that rule; and as well may any one part of an artificial system be censured as another, since the whole depends upon policy and convenience, and not upon any principle of justice or morality. Before the statute of wills, lands were not devisable at all, except perhaps in the Saxon times, or by particular custom. They became so generally by positive law. Judicial decisions have established certain rules for the construction of such devises. They may be arbitrary rules, but they are not more so than other parts of the system. They are simple and certain, and it is of importance that when once settled they should never be shaken. Estates are transferred under their authority; family settlements are bottomed upon them; and however in particular cases a violation of these rules may gratify the feelings of an individual, yet it lets in such a flood of uncertainty, that no one can tell what is the construction of a will without resorting to a court, and even different courts may as well disagree as different individuals. There is no safety but in an adherence to judicial precedent, until the legislature, not the court, shall think fit to destroy its authority. Two of these rules have been acquiesced in for a century and a half. The one is, that where real property is devised without limitation, it is but an estate for life, unless from other parts of the will, an intention to give a greater estate is plainly to be inferred. The other is, that the heir at law is not to be disinherited without express words, or necessary implication. Conjecture, ambiguity, uncertainty, shall never disinherit him. *Hayford v. Benlows*, Ambl. 583; *Harwood v. Goodright*, Cowp. 92; *Frogmorton v. Wright*, 3 Wils. 418; *Bowes v. Blackett*, Cowp. 235. In the present case the devise to the children of Sarah Evans is without limitation; and every argument in support of a fee, is not only conjecture, but it is conjecture in direct opposition to judicial precedent. The direction that the estate should be divided among the children is nothing. In *Dickens v. Marshal*, Cro. Eliz. 330, the devise was of all the testator's lands and goods to R. and M. his children, *equally to be divided* between them; and it was held to be an

estate for life. In *Peiton v. Banks*, 1 Vern. 65, the testator devised lands to his wife for life, and the reversion to A and B to be equally divided betwixt them; and yet A and B took but for life. Here was both the express estate for life, and the division, but without any influence. In *Woodward v. Glassbrook*, 2 Vern. 388, one devised several parcels of land to his several children in tail, and if any of them should die before twenty-one or unmarried, his part to go to the survivors; yet the survivors took only a life estate in that part. *Middleton v. Swain*, Skinner 339, is a strong case to the point, that although you may see enough on the will to make you think it probable that a fee was intended, yet *probability* will not do; it must be a plain case. As to the pecuniary legacy to the heir at law, the point occurred in *Roe v. Bolton*, 2 W. Black. 1045, where it was not allowed the least weight. The authority of *Pettiwood v. Cook*, has never been judicially shaken; it is supported by many later cases. The only decision which countenances the argument for a fee is *Wigfall v. Brydon*. But this case cannot be law; and if it be, it has been so explained as to be a very different case from the present. In *Burrow's* report of the case, Lord Mansfield puts the decision upon the estate's being small, a wasting estate, and not fit for division, which are not very good reasons. However be they good or bad they do not apply here, where the estate is large and has been divided. In *Wigfall v. Brydon* it was a house and barn. The true ground of that case was that the devise amounted to a power to *sell* and divide. So it appears from *Goodright v. Patch*. [Here the counsel read a manuscript note of that case taken by Mr. Edward Tilghman in the King's Bench in June, 1773.] *French v. M'Ilhenny* was a very different case. The will contained introductory words showing an intention to dispose of everything, and the devise in question was of all the plantation not before given to the wife, which was a life estate. The codicil to the present will negatives a fee, as it prohibits the devisees from cutting timber, which the testator would not have done, had he intended an absolute estate of inheritance.

TILGHMAN C. J.—Richard Clayton deceased, by his last will and testament dated 15th November, 1770, devised as follows. “I give and bequeath unto Sarah Evans wife of James Evans, and granddaughter of my sister Margaret Jones, and to her children, the plantation they now live upon, being the same tract of land I bought of Jacob Jones, containing one hundred and seventy-one acres, for the use of her the said

Sarah Evans during her life, and immediately after her decease to be equally divided among the surviving children of her the said Sarah Evans." A legacy of £10 was given to the testator's nephew Richard Clayton, who was his *heir*, and £40 apiece to each of his children. In a codicil dated the day after the will, there is the following clause: "And as for and concerning the plantation I have bequeathed to Sarah Evans wife of James Evans, for the benefit of her the said Sarah Evans and her children, my will is that the timber thereof shall be preserved, and not destroyed by any person or persons whatever, firewood and fencing, being for the use of the said plantation, excepted." Did the children of Sarah Evans take an estate for life or in fee simple? That is the point for our decision.

That the intention of the testator shall be carried into effect, if not contrary to law, even though such intention shall not be expressed in the usual form, is a principle not to be controverted; but such intention must appear by the *words of the will*, and not by *conjecture*. It is also a settled principle, that a devise of land to a person in general terms, without words of limitation, or any other words showing an intent to give more than an estate for life, shall pass no more than an estate for life, unless it can be fairly inferred from other parts of the will, that more than an estate for life is intended. For instance, if the devisee is ordered to pay a sum of money to another person, it may be fairly inferred that a fee simple was intended, because otherwise the devise might turn out to be an injury rather than a benefit. It has been often said, that it may be reasonably supposed the testator intends a fee simple in every case, in which there are no expressions to the contrary; that when a man gives a thing, he means to give the whole property. But although this has been said, it has always been added, that whatever *conjecture* the judge might form as to the intention, yet he is bound by the principle which in such cases has confined the estate to the life of the devisee. When a principle of construction has been fixed, it becomes a rule of property, and cannot be unfixed without violating the rights of property. Purchases are made under the advice of counsel, and the opinions of counsel are formed on the decisions of the courts. When the legislature think proper to make alterations in the law, they take care to confine them to *future cases*; but fluctuating decisions of courts of justice, have a mischievous *ex post facto* operation. These considerations have satisfied me, that I am not at liberty to indulge myself in *conjecture*, concerning

the intention of the testator. The estate is not to be taken from the heir, without an express devise, or words from which a clear implication may be drawn. Let us apply these principles to the will in question. An express estate for life is given to Sarah Evans, and immediately after her death the estate is to be *equally divided* among her children. Here is a devise in general terms to the children. What ground is there for implying a larger estate? It may be said, that inasmuch as their estate is not to commence till after their mother's death, it may be supposed that they were to take the fee, because otherwise they might derive but little benefit. This remark would have little weight, if it was now made for the *first* time. But after the numerous decisions, in which devises to commence in possession after the expiration of a life, have been held to convey no more than a life estate, it has no weight at all. Another circumstance relied on by the counsel for the plaintiff in error, is, that the estate is to be *divided* among the children. If the estate had been ordered to be *sold*, and the *money* divided, the absolute property would have passed to the devisees. But it is the *land* which is to be divided. The convenience with which the land may be divided, depends upon the quantity of the land, and the nature and value of the improvements, but by no means upon the quantity of estate given to the devisees. In support of the argument drawn from the estate's being ordered to be *divided*, *Oates ex dem. Wigfall v. Brydon* was cited, 3 Burr. 1895. Lord Mansfield in giving the opinion of the court in that case, says, "The testator gives to the seven children after the two lives, a *wasting* property, share and share alike. Besides, she directs the house and stable to be divided amongst the seven children, that is, they must be *sold and the produce divided*." If the will in that case directed the estate to be sold and the produce divided, no doubt the whole interest passed; or if the estate was of such a nature, that it could not be divided into seven parts, there would be some reason for saying that the testator knew it must be sold, and must have so intended. But if that

was not the case, it will be difficult to reconcile this opinion of Lord Mansfield with other decisions of good authority. In *Peiton v. Banks*, 1 Vern. 65, there was a devise to the wife for life, with remainder to A and B to be equally divided. It was held that A and B took an estate for life. In the manuscript note of the case of *Goodright v. Patch*, decided in the King's Bench 20th June, 1773, and shown to the Court by Mr. Edward Tilghman, it is said that the case of *Wigfall v. Brydon* turned on

the *selling and dividing*. And in *Denn ex dem. Gaskin v. Gaskin*, Lord Mansfield speaking of *Wigfall v. Brydon*, says, "the ground the court went upon, was, that from the nature of the estate, and the words used by the testator, they amounted in fact to a direction to sell the estate and divide the produce of it." Cowp. 659. Whether the court were warranted in putting that construction on the will, it is unnecessary now to inquire, because in the case before us, there is no ground for an argument of this kind. There is no difficulty about dividing, for the land has been actually divided; nor is there the most distant intimation of a desire that the estate should be sold. *French v. M'Ilhenny*, 2 Binn. 13, decided in this Court, was also cited. In that case the court were divided. A majority were of opinion, that taking the whole will together, they could discover an intent to give an estate in fee; but I did not understand that any change was intended to be made in the established principles of construction. Suffice it to say, that the expressions on which the court relied *there*, are not to be found in the will of Richard Clayton.

The last and strongest argument in favor of a fee simple, is drawn from the devise of £10 to the heir at law. This circumstance is worthy of consideration. It affords some ground for supposing, that as £10 was given it was intended that the heir should have *no more*. But a doubtful intention is not sufficient. The rule of law gives the estate to the heir, unless the will takes it from him; and in order to take it from him, it must give it to some other person. Thus we are brought back to the question, are there any words in this will, sufficient to convey more than an estate for life to the devisees? I can find none. If the testator had expressly said, that the heir at law should have £10 and *no more*, I should have thought his intention on the whole sufficiently clear, to give a fee to the children of Sarah Evans. But the implication arising from a small devise to the heir, without negative words added, has been expressly decided to be insufficient. In *Wright on the demise of Shaw v. Russel*, decided in the Exchequer in 1701, and cited by Justice Wright in *Gaskin v. Gaskin*, Cowper 661, there was a devise of 1s. to the *husband* of the heir, and yet the heir was held not to be disinherited. And in subsequent cases, the same principle has been adopted, when there were devises of a small sum to the *heir himself*. In such cases there is plausible ground for *conjecture*, that it was intended to *disinherit* the heir, because we know, it is a common notion, that it is necessary to give a shilling to the heir in order to *cut him off*. This notion is derived

from the Roman law, by which a testament was said to be *inofficious*, if no mention was made of the heir. The decisions in these cases, all tend strongly to confirm the principle, that the heir takes everything which is not given away by express words or clear implication. The will of Richard Clayton containing no such words, nor any ground for clear implication, I am of opinion that the children of Sarah Evans took no more than an estate for life.

The codicil is to be considered in conjunction with the will. I do not think the *direction* about the timber very material; but if it has any operation, it is against a fee simple, because a direction that a devisee in fee should not cut timber, would be inconsistent with the nature of the estate, and therefore void. My reason for not thinking it very material, is, that it is not clearly expressed to whom this direction is addressed, whether to Sarah Evans or her children.

YEATES J.—The question before the Court rests on the true construction of the last will of Richard Clayton deceased, dated 15th November, 1770, and the codicil thereto dated the day following. The material clauses are as follow. “I give and bequeath unto Sarah Evans, wife of James Evans, and granddaughter of my sister Margaret Jones, and to her children, the plantation they now live upon, being the same tract of land I bought of Jacob Jones, containing one hundred and seventy-one acres, for the use of her the said Sarah Evans *during her life*, and immediately after her decease *to be equally divided among the surviving children* of the said Sarah Evans.” In the codicil it is said, “And as for and concerning the plantation I have bequeathed unto Sarah Evans, wife of James Evans, for the benefit of her the said Sarah Evans and her children, my will is, that the timber thereof shall be preserved, and not destroyed by any person or persons whatsoever, firewood and fencing, being for the use of the said plantation, excepted.” There are no introductory words showing the intention of the testator to dispose of his *estate*, either by the will or codicil; nor are there any residuary devisees appointed by either instrument. The privileges out of the real estate devised to the widow, are confined to her state of widowhood. Sarah Evans the devisee died in the possession of the premises, leaving five children, one of whom has died intestate. The four surviving children have made partition, and twenty-nine acres and thirteen perches have been assigned to Elizabeth, who intermarried with the plaintiff in error,

as her full purpart and share of the lands devised as aforesaid. She is also dead, and the suit is brought to recover the possession of the twenty-nine acres and thirteen perches, by John Clayton, who has proved himself to be the heir at law of the testator. The question to be decided, is, whether the children of Sarah Evans named in the will, took an estate in fee simple in the said plantation, or only an estate for life.

On the part of the plaintiff in error, it has been strongly contended, that the intention of a testator as disclosed in his will, according to the plain meaning of his words in their common sense and understanding, is the paramount rule of construction; and that where the devise is conformable to law, no technical expressions whatever are necessary to effectuate his intent. All artificial rules are disclaimed; and it is confidently asserted that the compound construction of the *common acceptance of terms and the technical meaning*, has been the cause of uncertainty in the exposition of testaments. When a testator makes his will, it must be presumed that he means to dispose of all his temporal property; and this is strengthened by the circumstance of his not devising the residue. Introductory words in a will are the mere creatures of the scrivener who draws it; and nothing can be inferred from the want of them. No man of plain common sense on reading this will could hesitate in pronouncing, that when the testator gave the plantation to Sarah Evans during her life, and after her death to be legally divided amongst her surviving children, his meaning was, that those children should take after their mother's death, their several proportions thereof, absolutely and in fee simple; and this construction is fortified by a devise of £10 to Richard Clayton, his nephew and heir at law at the time of his death, and to each of his children £40.

The defendant's counsel fully admit, that the intention of the testator is the governing principle in the construction of wills and that there is no magic in any particular form of words, whereby his meaning may be effectuated; though it is indispensably necessary that his intention should be clear and manifest, from the expressions he has made use of. Independently of human laws, there is no natural right of succession to lands. The statutes of 32 Henry 8, c. 1, and of 34 and 35 Henry 8, c. 5, in England, gave the general power of aliening lands by will. It is agreed, that great indulgence is given in the construction of wills, the law considering the party *in extremis et inops consilii*. Though no words of limitation are added to a devise of lands, yet if there are.

expressions of equal import, as the words *forever, my estate, paying such a sum of money*, etc., the law will enlarge the gift accordingly. But the settled rule is, that the heir at law is the favorite of the law and of equity; and is not to be disinherited without express words or necessary implication. Ambl. 583. If the intention of the testator be doubtful, whether the devisee shall take in fee or not, the rule shall take place. Cowp. 92, 355; 3 Wils. 418. Without words of inheritance, an estate for life only passes. Cro. El. 330.

By discarding settled rules of construction, and adjudged cases on wills, a judicial tyranny will be established, and this branch of the law be thrown into confusion and uncertainty. No counsel can advise his client; under a controverted will no man can purchase with safety.

Many cases occur in the books, where there is a devise to one for life, the reversion over to others equally to be divided between them, and the latter have been held to take an estate for life only. *Peiton v. Banks*, 1 Vern. 65; *Bowes v. Blackett*, Cowp. 235. The words "*share and share alike*" are held to be tantamount to "*equally divided between them*;" and the word "*share*" was held to express the thing devised, and not the quantity of the estate. *Middleton v. Swain*, Skin. 339, which was affirmed in parliament. Show. Parl. Ca. 207. One devised several parcels of land to his several children in tail, and if any of them should die before twenty-one or unmarried, such child's part to go to the surviving children; adjudged, that the survivors should have such share for life only. *Woodward v. Glassbrook*, 2 Vern. 388. Devise of all my lands and goods after debts and legacies paid, to A and B my children equally to be divided between them; held that an estate for life only passed to them in joint-tenancy. *Dickins v. Marshal*, Cro. El. 330. As to the legacy of £10 devised by the present will to the heir at law, the Court of Common Pleas were clearly of opinion that a small pecuniary legacy to the heir is not sufficient to exempt a case from the general rule of law, which declares that a gift to a man of lands, without expressing for what estate, vests only an estate for life. *Roe ex dem. Callow et al. v. Bolton*, 2 Black. Rep. 1045.

The remark, that general introductory words, evincing a disposition to dispose of all the temporal estate, are the mere acts of the scrivener, either proves too much or nothing whatever. Assuredly the will is drawn by him; but if he does not with correctness reduce to writing the intent of the deceased, or uses unapt and improper words, whose legal opera-

tion is opposed to the will of the testator, what human tribunal governed by known and fixed rules of decision, can apply the remedy?

When it is asserted, that the plain meaning of the will was to give an estate in fee simple to the children of Sarah Evans in the lands in question, it is presupposed that the rules of granting realty and personalty are precisely the same, and that lands would pass with as little ceremony as a horse or cow. This certainly would prostrate all judicial decisions. At best however it is but guess and conjecture. Whoever drew the will, had some faint idea of words of limitation. When devising the negroes to the widow, he superadded the words "*and to her heirs and assigns;*" and in devising certain lands to Jonathan Clayton, he annexes the payment of a gross sum, which would clearly give a fee, the same being inconsistent with a life estate in the premises. To this may be subjoined the observation, that the restrictions imposed in the codicil, as to the preservation of the timber on the plantation devised to Sarah Evans and her children, are totally incompatible with the latter taking a fee simple interest therein. Admitting however the meaning of the testator herein to be problematical, the rule of law is decisive against the pretensions of the plaintiff in error.

I feel no difficulty whatever in the decision of the present case, either on principle or precedent. An act of the legislature (passed on the 28th January, 1777,) has declared, that the common law and such of the statute laws of England, as had theretofore been in force, except as is thereafter excepted, shall be in force and binding on the inhabitants of this State. The rule relied on by the plaintiff is frequently asserted in the English books, which are evidence of the common law. This court, and I think I may safely add, every other court of justice in the government both before and since the American revolution, have adopted it. In *Bushby v. Bushby*, 1 Dall. 226, we find these expressions of Shippen president of the Common Pleas. "The intention of the testator is said to be the pole star, to guide the construction of wills. But there are two qualifications to this rule, 1st, that this intention must not clash with the rules of law, and 2d, that where legal technical terms are wanting, the intention to supply them must be clear and manifest from the words and expressions in the will." I cannot see on what grounds the judiciary would be authorized to change the strong uniform current of decision, unless by the aid of the legislative branch.

But independently of the act of 1777, could we either with propriety

or convenience to the public peace and safety, change the system of law on this subject? As to myself, I find the decisions of our own courts an insuperable obstacle in my way; and I frankly declare, that I am not prepared to go the whole length of declaring independence of the decisions of the English Courts, previous to the 4th July, 1776, subjecting the construction of a will to technical rules. My habits, grown rigid during the period of half a century of my life, imperiously interdict the measure. I have been taught to consider those judicial determinations as a system of refined wisdom matured by experience, which it would be highly dangerous now to unsettle. I view them as establishing the landmarks of property, which it would be unjust now to vary or remove. In a particular instance my individual wishes may lead me to desire, that the devise was couched in different terms, in order to accomplish my ideas of the supposed intent of the testator. I will construe a will, and imply an intention not expressed therein, in words particularly; but I will not from arbitrary conjecture, though founded on the highest degree of probability, add to a will or supply the omissions. I go as far as I can, when I repeat the language of an English judge. "I will depart from the technical sense of words, to effectuate the intention of a testator, as far as possible without violating the rules of law." In matters of positive right, I must submit to and follow those ancient and invariable maxims, *quæ relicta sunt et tradita*. 3 Bl. Com. 436. It is not of so much moment what the law is, as that it should be known and settled. When this takes place every citizen is bound to conform to it; and when a case of seeming hardship occurs, wherein I may think the will of a testator has been disappointed, I console myself with the reflection, *sic voluit sed non dixit*. It is most congenial to the spirit of a government of laws, that known rules should determine the conduct of their tribunals of justice, and the steps of their judges be measured. The observation applies with peculiar force to the case of wills, wherein different and contradictory intents often appear on the face of the same instrument, wherein the meaning is not conveyed with any degree of precision, and the different events which might take place have not been contemplated. In such instances, with all the assistance we can derive from our books, we are thrown under the greatest embarrassments; but without it, shall we not according to the ludicrous idea of Mr. Selden (untruly applied to a court of equity), make the measure of the judge's foot, the rule of decision? In my

view of the case, the utmost uncertainty and confusion must necessarily be introduced by this rage of innovation.

The established rule is thus laid down by Lord Mansfield in *Loveanes* on the demise of *Mudge v. Blight et ux.*, Cowp. 355. "Where there are no words of limitation, the court must determine in the case of a devise affecting real estate, that the devisee has only an estate for life; because the principle is fully settled and established, and no conjecture of a private imagination can shake a rule of law. If the intention of the testator is *doubtful*, the rule of law must take place; and if so the Court cannot find words in the will sufficient to carry a fee. Though they should themselves be satisfied beyond the possibility of a doubt, as to what the intention of the party was, they must adhere to the rule of law."

The observations of the defendant's counsel abundantly satisfy my mind that the intention of the testator to grant a fee simple to the children of Sarah Evans in the lands in question, was at least doubtful; and the authorities they have cited fully confirm this remark. See also *Moone lessee of Fagge v. Heaseman*, Willes 141.

I am therefore of opinion that judgment should be entered for the defendant in error.

BRACKENRIDGE J.—The language of this will is not that of a *learned* or *half learned* person, but evidently of the testator's own writing, without a single word through the whole that savors of an affectation of *scientific terms*; for I consider the words "heirs and assigns" annexed to the gift of the "*negro boy*" devised to the wife, as slipping in of course, from having used it, or seen it used in a bond or promissory note, where being unnecessary, we have it without any meaning, now that a note is assignable by act of assembly, and the interest in the nature of it goes to the executor, and not to the heir in the technical sense of the word. It would have saved this trouble, if these words had been annexed to the devise of *the real estate*; and perhaps it would be no great strength of construction, if we were to carry them forward in our minds, and make use of them when *first wanted*. This is thought to be, when we come to the devise of the "*plantation to the wife of James Evans, and granddaughter of his sister Margaret Jones, and to her children.*" But as this might be considered a stretch beyond the indulgence shown to wills, I shall not insist upon it; though at the same time if the testator thought

of the use of these terms "heirs and assigns" at all, I have no manner of doubt, but that he thought that having put them in the writing *once* at the beginning, they would serve to *season it through the whole*, and qualify every bequest that was subsequently made. But I flatter myself we shall be able to do without them, and be justifiable in inferring *a devise in fee simple* from the terms that are used. I shall take notice nevertheless of the other devises, "*to his nephew, Richard Clayton, the son of his brother, John Clayton, £10; to the children of the said Richard Clayton, each and every one of them, forty pounds; to his nephew Jonathan Clayton, the son of his brother John, his mansion house, with the land thereunto belonging.*" Here are no words of inheritance, more than in the case of other devises of personal property; and yet I cannot doubt but that he meant his nephew should have the *mansion house and land*, out and out. It has not been questioned under this will but that he does so hold it. The plaintiff is the *descendant of the nephew* Richard, to whom the devise of ten pounds was made; and to whose children a farther devise of forty pounds each, which may fairly be considered as all that was intended that stock; yet it is *one of these* that now claims the estate in question against another devisee.

But to come to the terms that are used in the devise under which the defendant claims. These are found in the will, and in the codicil. But before we undertake to consider these, let there be premised an observation on *the history of the construction of wills*. The power to devise being *given by statute*, it came to the courts to construe wills *as other writings*; and why introduce a distinction in the construction of these, and other writings? What distinction? Why that *the intention* shall govern, but that the same words which would *be evidence of intention* in the case of a chattel, shall not evince in a case of real estate. Yet they did not require the technical terms of a deed, but indulged the lay people, who might be supposed to write their own wills, to a certain extent. And why not to the whole extent of the proper language? *Licentia sumpta pudenter*, it may be said; and that it would be too great a stretch at once to go so far. It would have been equally justifiable however, and certainly more for the quiet of possessions. The rule ought to have been, *that unless something appears in the will from which a less estate than a fee simple is given, the devise shall carry a fee*. The rule is otherwise; viz., that something must appear, more than the mere giving

the property, from whence it may be inferred that a fee simple was intended. The mere naked words, *I give the land*, as in the case of a personal chattel, will not suffice. It is true the decisions have brought this to a very slight matter. Introductory words declaring an intention to dispose of the *whole worldly estate, to settle temporal affairs, etc. Estate* and even *effects* have been considered *ex vi termini* as carrying a fee. The word *settle*, certainly has. That I may not be thought to speak without book, I cite the case, Barnard, Chancery Rep. 14; 8 Viner 230. I meant to have said, cite the books which refer to the case. "What I have I intend to *settle* in this manner." By the word *settle* says the Lord Chancellor, the testator shows his intention to make a *settlement* of the whole estate, and therefore a fee. He farther observes, that "*all cases depend upon their particular circumstances, and the evidence of the testator's intention arising from these.*" This last sentence is the best dictum that I have met with in the books; for the taking the relative situation of the testator and the devisees into view, the branches of the family referred to in the will, and the provisions made, in connection with the words of the devise, these may assist in demonstrating the intention. But in this case, from the words of the will in the devise itself, independent of circumstances, I can have no doubt that a fee simple was intended. "*The plantation for the use of the sister's granddaughter during her natural life, and immediately after her decease, to be equally divided amongst her surviving children.*" It could not come to the children until after her decease, because until that time it could not appear what children would be surviving. It was not therefore a devise to her and her children jointly, for they *did not take at the same time*. It was a life estate cut out of the fee, to the mother in the first instance; then *the plantation* to the children. Even did the case rest here, I should have no doubt the testator meant the fee simple after the life estate. But the plantation *to be equally divided*. Can it be possible that he meant a life estate after the subdivision? That a hundred and seventy-one acres should be divided between five, a dwelling house it may be presumed built by each upon his lot of fifty acres, a garden, an orchard, a grass plot or meadow, and that an individual from the *rookery of heirs* should come in at a distant day and possess these improvements? *The subdivision* is conclusive with me that he intended an inheritance.

But it is alleged that the codicil qualifies, and shows that a fee was

not intended, viz., "As for and concerning the plantation, my will is, that the timber thereof shall be preserved, and not destroyed by any person or persons whatsoever, firewood and fencing excepted." What can this relate to, but to the life estate to the mother, with which estate such a restraint is perfectly consistent? So far from evincing a qualification of the interest in the tract that was afterwards to be divided, it proves to me the solicitude of the testator to preserve it with woodland as it was, in order that it might be subdivided with convenience of timber to the children, when, on the death of the mother, *they came severally to enjoy it*. At all events it is nothing more, fairly construed according to what we know of the care of an uncle, than a caution or direction in *the use*, and not a qualification of *the interest* in the estate. It would be an unnatural appropriation of the terms to give them that effect.

Now for authority, as it is called; though I will acknowledge, I set little store by the early decisions, when it was a struggle with the courts, whether and to what extent they would indulge in wills. Yet I will cite one case referred to in the books, and which looks a little like the case here. "All the rest of my estate I devise, one third to my wife, and the rest to my children *equally to be divided between them*." *Carter v. Horner*, 4 Mod. 89. In *Skinner* 195, the same case is cited by the reporter, and affirmed to be adjudged "*that all past in fee*, and it was enjoyed accordingly." A having three sons, devised to them his *lands equally to be divided*. They have a fee simple; for if the younger had not a fee, he would not have an equal share to the other. 8 Viner 237.

I had taken it that the decision in *French v. M'Ilhenny*, though without the Chief Justice, yet by force of number, if not by weight of judgment, had become a precedent in our decisions. But in the case of *French v. M'Ilhenny*, there was more difficulty in making out a fee than in this. Here I take it there is plain sailing. The words "for life" used in the devise to the mother, *omitted in the devise to the children*, is as much as to say, to them *not for life, but altogether*. This is the reasoning of Justice Wilmot, who delivered the opinion of the Court in the absence of Lord Mansfield, as reported in 3 Burrow 1539. "Devise to Clement Boreham *for and during the term of his natural life*, followed by a devise to Sarah Boreham of another tenement. But in the devise to Sarah, he *omits* the words, *for and during natural life*; which words it must be supposed he would have *inserted* in case he had intended to give her only an estate for life, because he had just before

done so in the preceding devise to Clement. It is plain that by giving it to her generally, without having any such restrictive words as he had before added to his devise to Clement, that he meant to give her the absolute property. He meant to devise it *ut bona et catalla*, as a man unacquainted with the law might very naturally do." So far Justice Wilmot; and if any one will examine the devises to which he refers, he will find the argument holds more strongly in the devise here; because in the devises there, there were distinct devisees, and distinct subjects of devise in distinct sentences; here he will find the devise to the wife and children to be of the same subject, and in the same sentence.

Justice Wilmot farther observes in that case, which is also an argument in ours, *that there is no devise over*. In the case of *French v. M'Ilhenny* it is to be noticed that the devise for life was but of *one half of the plantation*; and as to the remaining half it had not a life estate to support it, and to make it a remainder of the fee simple. As to the half therefore, it must be considered as given nakedly, without any part hewn out; and to have been held to be a fee, by the mere force of the words *bequeath the plantation*. It is true that in that case we had the word *estate* in the introductory part of the will, which was noticed by me, not that I laid any stress upon it in my own mind, but as referring to the English decisions which have laid stress upon it in some cases. For the truth is, I have always thought the argument drawn from the word *estate*, *effects*, *settle*, etc. etc., whether introductory, or in the devise itself, to be but a quibble; and to have been adverted to in these decisions as a way of getting over a rule of construction which had better been set aside. It is on the same principle that slight matters have been laid hold of, collateral to the devise itself, to take the case out of the general rule, such as the devisee paying *even a small sum*, say forty shillings.

The heir is said to be favored by the common law; but *quære*, whether he is so under our laws, where the right of primogeniture has been abolished or abridged from the earliest period, and the proprietary grants, and the statutes of distribution, and decision of the courts, and the policy of the whole law, look to alienation and subdivision of property. But the devise in this case *to a stranger*, savoring of the *testamentum inofficiosum*, I should be disposed to favor the heir; for I would look to the estate as coming from the ancestors, and the right of the testator to devise, as subject in a degree to this consideration, in which the law of

descent may find some reason for its policy. In this case the devise is to a *sister's children*. It is *by an uncle to orphans*. It is of a plantation of *his own acquisition*, and which *did not descend to him*; it being the same tract of land, *as he himself recites*, which he bought of Jacob Jones. No claim therefore could be grounded on the acquisition of an ancestor, and the interest of a common stock. He was free therefore to dispose of it, absolved from all common law consideration. How is the heir to be favored, who has been passed over with a reasonable provision for him and his children in the same will? I am the more particular in the consideration of this case, from a respect to the judge of the Common Pleas from whom the appeal comes. And having been led to expect a majority of this court against me, I am solicitous that it may appear that I have strong impressions, if not strong reasons to justify my dissent.

Judgment affirmed.

It is proposed in this note to consider the method of creation of an estate in fee-simple (1) by deed; and (2) by devise.

1. CREATION OF FEE-SIMPLE BY DEED.

The rule of the common law is that in order to vest an estate in fee-simple in a natural person, the deed or conveyance must contain an express limitation to the said person and his heirs; the word "heirs" being the operative term. There are few rules of the common law which have been so inflexibly and so constantly enforced as this, even the manifest intention of parties to a deed being made to give way before it.

This rule and its uncompromising nature have been recognized in the United States as binding, except where modified or abrogated by statute. *Hileman v. Bouslaugh*, 13 Pa. St. 344; *Hogan's Heirs v. Welcker*, 14 Mo. 177; *Sisson v. Donnelly*, 7 Vroom 432; *Adams v. Ross*, 1 Id. 505; *Merritt v. Disney*, 48 Md. 344; *Patterson v. Moore*, 15 Ark. 222; *Jackson v. Myers*, 3 Johns 388; *Edwardsville R. R. Co. v. Sawyer*, 92 Ill. 377; *Reaume v. Chambers*, 22 Mo. 36; *Sedgwick v. Laftin*, 10 Allen 420; *Den d. Roberts v. Forsythe*, 3 Dev. L. 26. The rule applies with equal force also to cases of reservation and of exception. *Curtis v. Gardner*, 13 Metc. 457; *Ashcroft v. Eastern R. R. Co.*, 126 Mass. 196; *Kister v. Reiser*, 38 Leg. Int. 300. The word "heirs" cannot be supplied by "children," *Adams v. Ross*,

supra; or by "executors, administrators, and assigns," *Clearwater v. Rose*, 1 Blackf. 137; *Taylor v. Cleary*, 29 Gratt. 448; or "successors and assigns," *Buffum v. Hutchinson*, 1 Allen 58; *Miles v. Fisher*, 10 Ohio 1; nor will words which show an intention on the part of the grantor that the estate granted shall endure indefinitely, enlarge a grant without the word heirs to more than a life estate. See *Foster v. Joice*, 3 Wash. C. C. 498, where a grant "to J. and his generation, to endure so long as the waters of the Delaware run," was conceded to be a life estate only. *Arms v. Burt*, 1 Vt. 303, and *Stevens v. Dewing*, 2 Vt. 411, have been cited to the contrary (1 Washburn R. P.). But an examination of the cases shows that in both the word heirs was used in the grant, which was in the following form: "to A. and his heirs for 1000 years, or as long as wood grows and water runs." So that these cases are not authority for the position that a circumlocutory expression can supply the lack of a limitation to heirs, but in effect merely are examples of the alternative expression combined with a limitation to heirs turning a lease for a thousand years into a fee.

The word heirs must appear in the operative part of the deed or grant. It need not, however, appear in the premises or grant proper; it is sufficient if it appear in the habendum, the particular office of which is to define the amount of the estate taken by the grantee, *Bank v. Myley*, 13 Pa. St. 544. The habendum may enlarge the estate named in the premises, *Chaffee v. Dodge*, 2 Root 205. It cannot, however, give a legal estate where an equitable estate only is granted in the premises, *Hastings v. Merriam*, 117 Mass. 245; *Chapin v. First Universalist Society*, 8 Gray 580.

An estate less than a fee cannot be enlarged thereto by words in the covenants or in the warranty, *Sisson v. Donnelly*; *Adams v. Ross*, *supra*; *Den ex d. Roberts v. Forsythe*, 3 Dev. L. 26; *Phillips v. Thompson*, 73 N. C. 543; *Patterson v. Moore*, 15 Ark. 222. In a case, however, where the warranty and the habendum were run together, the court, while admitting the general rule, held the composite clause to be a clumsily constructed habendum, and construed the deed as passing a fee, *Phillips v. Thompson*, *supra*; and in *Saunders v. Hanes*, 44 N. Y. 353, where the question was upon a deed, made in 1804, containing no words of inheritance in the habendum, a restriction upon the grantee and his heirs was allowed to enlarge an estate to a fee.

A deed to S. and her "bodily heirs" is sufficient to pass the fee, *True v. Nicholls*, 2 Duv. 547; and generally, since the passage, in the various States of the Union, of the statutes abolishing estates tail, words which would formerly have passed an estate tail will pass the fee, *Kirk v. Furgerson*, 6 Cold. 479; *Andrews v. Spurling*, 35 Ind. 262; *Singletary v. Hill*, 43 Tex. 858.

“Heirs” Supplied by Reference to Another Instrument.

The word “heirs” may be supplied by reference to another instrument in pursuance of which the deed under consideration has been, and professes on its face to be, executed, or which is made part of the deed, which instrument referred to, itself contains the word “heirs;” *Merceir v. Mo. River, Fort Scott & G. R. R. Co.*, 54 Mo. 506; but this rule must be strictly applied, and no intention, no matter how clearly manifested, that the instrument referred to, even though it be a will, shall pass a fee, unless it contain the word heirs, will be incorporated into the deed so as to make it pass a fee without words of inheritance—as, where one, having a fee under a residuary devise, as follows: “The remainder of my real and personal property I will to be evenly divided betwixt my children,” made a deed conveying “all his part of the estate left to him by his father’s last will and testament,” it was held that a life estate only passed by the deed, *Lytle v. Lytle*, 10 Watts 259. And in *Reaume v. Chambers*, 22 Mo. 36, on the back of a deed in fee was written another, reciting that the grantors “sold, ceded, and transferred all their part of the land sold by their coheirs in the sale above.” The reference was held insufficient to pass a fee, the court saying, “This is one of those cases in which the intent of the parties cannot prevail. The law has appropriated certain words for passing a fee-simple in real estate, and unless they were used, their intent, however forcibly expressed, could not prevail.”

Exceptions to Rule.

The rule, however, requiring the use of the word heirs has some exceptions. It does not apply to an executory agreement enforceable as a conveyance in equity, *Defraunce v. Brooks*, 8 W. & S. 67; nor does it apply in certain grants in trust. Where an estate is given without words of inheritance in trust for one and his heirs, it has been held that the trustee must take a legal estate commensurate with the equitable estate of the cestui que trust, and therefore a fee, *Newhall v. Wheeler*, 7 Mass. 189; *Brooks v. Jones*, 11 Metc. 191. In *Jackson v. Myers*, 3 Johns 388, however, it was held that where the legal estate is granted without words of inheritance in trust for one and his heirs, a life estate only passed to the trustee; that on his death the fee would revert to the grantor and his heirs, against whom the cestui que trust would be obliged to enforce his rights in equity. Where an estate is given in trust without words of inheritance, and it is necessary for the fulfilment of the purposes of the trust that the trustee shall have the legal estate in fee, a fee-simple will be held to pass, *North v. Philbrook*, 34 Me. 532; *Hawkins v. Chapman*, 36 Md. 83; *Welch v. Allen*, 21 Wend. 147; *Spessard v. Rohrer*, 9 Gill 261; as where a power to sell is given, *Angell v.*

Rosenbury, 12 Mich. 241; *Neilson v. Lagow*, 12 How. 98; even if the power is to be exercised only on a contingency, *North v. Philbrook*, *supra*.

The proper words of grant of a fee to a corporation are to it and its successors, and it has been held that a grant to a town and its assigns, "said land being for the use of a common," is a grant to the town in fee, and not merely a dedication to public use, *Beach v. Haynes*, 12 Vt. 15.

In Massachusetts it was as early as 1651 enacted that the rule requiring the word heirs should not apply to grants by a town, and in the *Feoffees of the Grammar School in Ipswich v. Andrews*, 8 Metc. 584, the Supreme Judicial Court of Massachusetts, in construing a grant made in 1650, and which did not contain words of perpetuity, held that in view of the general ignorance of conveyancing existing in the colony at the time the deed was made, the manifest intention of the parties thereto should be carried out, and that a fee passed.

Abrogation of Rule by Statute.

The rule has been abrogated by statute in the following states: Alabama, see Code of 1876, § 2178; Arkansas, Rev. St. 1874, § 831; California, Civil Code, §§ 6072, 6105; Colorado, Gen. Laws 1877, p. 134, § 7; Georgia, Code 1873, 2248; Illinois, Rev. St. 1845, p. 105, § 13, Rev. St. 1880, ch. 30, § 13; Iowa, Rev. St. 1880, Tit. xiii., § 1970; Kansas, Compilation of 1879, ch. 22, § 2; Maryland, Rev. Code 1878, Act 4455; Nebraska, Gen. St. 1873, ch. 61, § 49; New York, 1 Rev. St. 748, § 1; Oregon, Gen. Laws, ch. 7, § 4, p. 647; Tennessee, Act 1851-2, ch. 33, § 1, Thompson & Steger's Stat. of Tenn., § 2006; Texas, Paschal's Dig., § 999; Virginia, Code of 1873, Tit. 33, § 1; Wisconsin, Rev. St. 1878, ch. C., § 206. In these states the law may be generally stated to be that neither heirs nor any other technical word is required to convey or create an estate in fee, but that all conveyances of land are to be taken as in fee-simple, unless a contrary intent is expressed in the deed or follows by necessary implication from its expressions. In some a short form of deed has been given by statute.

A deed which contains no words of grant, but from the terms of which an intent to grant an estate can be collected, and which contains an habendum to one and his heirs, will pass a fee-simple, *Bridge v. Wellington*, 1 Mass. 227.

A fee may be well granted with a reservation of the usufruct to the grantor for life, *Cribb v. Rogers*, 12 S. C. 564; *Waugh's Ex. v. Waugh*, 84 Pa. St. 350.

Effect of Warranty.

Where an estate for life is given it will not be enlarged to a fee by a warranty of title or covenant for quiet enjoyment to the grantee and his heirs, for the warranty is an accompaniment of the estate, and when the estate granted ceases the warranty ceases also, *Den ex d. Snell v. Young*, 3 Ired. Law 379; *Register v. Rowell*, 3 Jones Law 312; nor is the case altered when the warranty is *against* the grantor, his heirs, executors, and assigns, 15 Ark. 222.

2. CREATION OF FEE-SIMPLE BY DEVISE.

A much greater liberality of practice exists at common law in the creation of estates in fee-simple by devise than by deed. The general rule that a fee will not pass without words of inheritance or perpetuity is, indeed, recognized, *Wright v. Denn*, 10 Wheat. 204; *Christie v. Gage*, 5 Lans. 139. But it has been so modified and restricted in its application, by that other well-known rule of law—that it is the duty of a court to interpret a will according to the intention of the testator, and, having discovered that intention to carry it out if legal—that the life and strength of the rule of limitation may be said to have been gone, even before the passage of the various statutes in the different States of the Union for the better effecting of the will of the testator, and which, in most cases, may be said to have, at least from a legal point of view, done little more than change the presumption as to what estate is intended by a devise without words of inheritance.

In the consideration of our subject, we shall treat it as at common law first, and refer to the statutes later.

The rule that technical expressions, or the lack of them, should not prevent the limitation of an estate in accordance with the testator's intention as discoverable in his will, was applied in this country at an early date, and, with its qualifications, was well stated by SHIPPEN, P. J., in 1787, in the case of *Busby v. Busby*, 1 Dall. 226, as follows: "The intention of the testator is said to be the pole-star to guide the construction of wills. But there are two qualifications—first, that this intention must not clash with the rules of law; and, secondly, that where legal technical terms are wanting, the intention to supply them must be clear and manifest from the words and expressions in the will."

A difference of opinion soon arose amongst judges and lawyers as to the application of the rule, some contending that the utmost liberality of interpretation should be allowed in order to ascertain and carry into effect the testator's intention, being, as BOWEN, J., said he was, "prepared to go the whole length of decedent's intention and independence of the decisions of the

English courts subjecting the construction of a will to technical rules," *French v. M'Ilhenny*, 2 Binn. 13; whilst others considered this great liberality as forbidden by other rules of law, and held themselves bound to uphold the ordinary technical force of words, except where the intent of the testator to use them in another sense, or to disregard them, manifestly and necessarily appeared from the expressions of the will. At the head of this school of constructionists stood Chief-Justice TILGHMAN, who stated his view of the law as follows: "That the intention of the testator shall be carried into effect, if not contrary to law, even though such intention shall not be expressed in the usual form, is a principle not to be controverted; but such intention must appear by the *words of the will* and not by *conjecture*. When a principle of construction has been fixed, it becomes a rule of property, and cannot be unfixed without violating the rights of property. Purchases are made under the advice of counsel, and the opinions of counsel are formed on the decisions of the courts. When the legislature think proper to make alterations in the law, they take care to confine themselves to *future cases*; but fluctuating decisions of courts of justice have a mischievous *ex post facto* operation. These considerations have satisfied me that I am not at liberty to indulge myself in conjecture concerning the intention of the testator." And, in the course of his dissenting opinion in *French v. M'Ilhenny*, the same learned judge, while he acknowledged that he thought it probable that the testator intended to give to the devisee a fee-simple, said that he was unable to get over "a principle which seems to be well established, viz.; that the inheritance shall not be taken from the heir unless the devise contains the proper words to create a fee-simple (to the devisee and his heirs), or words which have been construed as tantamount, as to the devisee forever, or all his estate on the land to the devisee, or unless in some other part of the will an intent is manifested inconsistent with a less estate than a fee-simple, as if the devisee is directed to pay a sum of money to a third party."

French v. M'Ilhenny went a great length in the direction of free, or, as it might be termed by some, conjectural interpretation. Its authority, however, was considerably weakened by *Clayton v. Clayton*, 3 Binn. 476, in which case BRACKENBRIDGE, J., dissenting, charged YEATES, J., who, with him, had overruled TILGHMAN, C. J., in *French v. M'Ilhenny*, with having given up the principle of that case, and by *Steele v. Thompson*, 14 S. & R. 84. Still, in spite of the earnest efforts of some very learned jurists, the current of decision set strongly in favor of great liberty of interpretation, and while in subsequent cases we rarely find the question of a free or strict construction discussed, yet the practice soon arose of disregarding technical rules of construction upon very slight intimations of intention.

In noting cases of the enlargement of devises, without words of limitation, from life estates unto fees-simple, it is, of course, hardly necessary to say, what has been in effect said over and over again, but perhaps never better than by the court in *Gulliver v. Poyntz*, 3 Wilson 141, "Cases on wills may guide us to general rules of construction, but unless a case cited be in every respect directly in point, and agree in every circumstance, it will have little or no weight with the court, which always looks upon the intention of the testator as the polar star to direct it in the construction of wills."

The general rule is that no evidence outside of the will itself can be given to show what estate the testator intended that the devisee should take; but where the will refers to another writing, the court will examine the writing and construe the will in connection with it, *Jackson v. Babcock*, 12 Johns 389.

Enlargement of Devise by Use of Words Equivalent to a Devise in Fee.

A devise without words of limitation may be enlarged to a fee-simple by the use of words which have been held equivalent to a devise in fee. Chief amongst these words is "estate," which word is regarded as referring to the whole interest owned and possessed by the testator in land, and not as merely referring to a thing or a locality. A devise, therefore, of the testator's "estate," uncontrolled by other expressions, or by the context of a will, is a devise of the fee, *Jackson v. Merrill*, 6 Johns 185; *Doe v. Harter*, 7 Blackf. 488; *Rush v. Kinney*, 3 Ind. 50; *Donovan v. Donovan*, 4 Harring 177; *Kellogg v. Blair*, 6 Metc. 325; *Godfrey v. Humphrey*, 18 Pick. 537; *Arnold v. Lincoln*, 6 R. I. 384, and this although it be accompanied by words of locality and description, as "all the estate called Marrowbone in the county of Henry, containing," etc., *Lambert's Lessee v. Paine*, 3 Cr. 97; *Leland v. Adams*, 9 Gray 171; and where the devise is general, "all my estate, real and personal," *Brown v. Wood*, 17 Mass. 68; *Arnold v. Lincoln*, *supra*; *Culbertson v. Duly*, 7 W. & S. 195; or of the residue or remainder "of my estate real and personal," *Peppard v. Deal*, 9 Pa. St. 140; *Browne v. Doughty*, 4 Yeates 179; or "the residue of the real estate," *Forswith v. Clark*, 21 N. H. 409.

Another such word is "property," as said by BELL, J., in *Fogg v. Clark*, 1 N. H. 163, "The word property in its most strict and proper sense relates solely to the quantity of estate in the land, and, unless words restraining its significance are added, always means the whole interest. The word property in such connection is synonymous with the word estate or interest, and includes everything in the land which the testator possessed." A devise

of "property" in connection with expressions showing the word to be referable to real estate of the testator, or where the devise is of all the testator's property, will give a fee-simple to the devisee. *Rossetter v. Simmons*, 6 S. & R. 452; *Stoever v. Stoever, to use, etc.*, 9 Id. 445; *Jackson v. Housel*, 17 Johns. 281. So the expressions "my land property," *Foster v. Stewart*, 18 Pa. St. 23; "all my land property in N.," *Fogg v. Clark, supra*; my "real property," *Niles v. Gray*, 12 Ohio St. 320; *Dice v. Sheffer*, 3 W. & S. 419; *Morrison v. Semple*, 6 Binn. 94; "my undivided half of the P. mill and privilege, and the land and dwelling-house occupied as a part of said mill estate," *Waterman v. Green*, 12 R. I. 483; "rest and residue of all my property, real, personal, and mixed," *Lincoln v. Lincoln*, 107 Mass. 590, have been held to pass a fee. So also the devise of all the testator's "right" in certain rents, *Newkerk v. Newkerk*, 2 Caines 345; or of all his "right and title," he having a fee, *Merritt v. Abendroth*, 24 Hun 218.

A devise of "all and singular my goods and effects" has been allowed to pass a fee, *Lessee of Ferguson v. Zepp*, 4 Wash. C. C. 645; also "my late purchase," the said purchase having been in fee, *Neide v. Neide*, 4 Rawle 75; "my plantation," *Jenkins v. Clement*, 1 Harp. Eq. 72; *Waring v. Middleton*, 3 Des. Eq. 249; *Clark v. Mikel*, Id. 168; *French v. M'Ilhenny, supra*; but see, *contra*, *Steele v. Thompson*, 14 S. & R. 84, where a devise of "the plantation which I now live on, which hath two deeds," was held not to confer a fee, and the remarks of STORY, J., in *Wright v. Denn, supra*.

The word "share," preceded by words showing a desire to dispose of the whole estate by will, has been held to carry a fee-simple, *McClure's Heirs v. Douthitt*, 3 Pa. St. 446; and also the following expressions: "to my wife the land which her father gave me," *Purcell v. Wilson*, 4 Gratt. 16; "one-half of all and everything that shall fall to me at my mother's death," *Chamberlain v. Owings*, 30 Md. 447.

A devise of the profits, rents, and income of land will vest a fee in the devisee, *Drusadow v. Wilde*, 63 Pa. St. 170; *Anderson v. Greble*, 1 Ashm. 138; *Carlyle v. Cannon*, 3 Rawle 489; *Earl v. Grim*, 1 J. C. R. 494; but not where they are given for a limited time only, *Earl v. Grim, supra*; and a devise of the income, rents, and use, followed by a devise over on the death of the first taker, will give a life estate only, *France's Estate*, 75 Pa. St. 220. So a devise of the "use forever" will give a fee, but where the land is given for a certain use which would not require any title in the estate to support it, the intent of the testator will be held to be to give a mere easement, *Saxton v. Mitchell*, 78 Pa. St. 481.

The use of the word "absolutely," immediately following a gift to a widow of "so much of my estate as the law allows her under the intestate laws," where the intestate laws gave the widow a life estate in one-half of

her husband's realty, will enlarge the devise to a fee-simple, *Oswald v. Kopp*, 26 Pa. St. 516.

A devise to one "to have, hold, and enjoy forever, for the free use of her and no other person, excepting by her assignment and will," will carry a fee, *Den d. Bolton v. Bowne*, 3 Harr. (N. J.) 210; and also a devise to several to enjoy and hold the same as tenants in common, *Crosky v. Dodds*, 87 Pa. St. 359; but a mere devise of a "tract," excluding a portion previously devised for life, will not raise a fee-simple by implication, *Wilson v. Wilson*, 4 T. B. Mon. 159; nor, at common law, a devise of "all the rest of my lands," even if followed by the words "in possession, reversion, or remainder," *Wright v. Denn*, *supra*.

Since the abolition of estates tail, words that would formerly have given to the devisee an estate tail will give him the fee-simple, *Wells v. Beall*, 2 G. & J. 458; *Carter v. Tyler*, 1 Call. 144; *Breckenbridge v. Denny*, 8 Bush. 523; *Hounstea v. Hand*, 21 Hun 251; *Deboe v. Lowen*, 8 B. Mon. 616; *Middleton v. Smith*, 1 Coldw. 144.

In some cases a fee has been inferred from the nature of the land devised, or the condition of the title by which it is held. Thus, a devise of wild land without words of inheritance has been construed a devise in fee, on the ground that the deviser must be taken to have intended to confer a benefit upon his devisee by making to him a bequest; and if the devisee were limited to an estate for life, he would not receive, nor could he obtain, any benefit whatever from the land, since he could not even cut the trees, from the sale of which the chief, if not the only, value of wild land arises, without being liable for waste; so that a gift of such land for life would be nothing more than the imposition of an obligation to pay taxes, *Caldwell v. Ferguson*, 2 Yeates 380; *Sargent v. Towne*, 10 Mass. 303; *Ridgway v. Parker*, Id. 305, note; *Russell v. Elden*, 15 Me. 193. It has also been held that a devise of land, which the testator held by an equitable or unperfected title from the state, did not require words of inheritance to render it a devise in fee, where the will showed an expectation on the part of the testator that the devisee would perfect the title by obtaining the necessary title papers from the state, *Lindsay v. M' Cormack*, 2 A. K. Mar. 229.

A case which goes very far in upholding the presumed intent of the testator when expressed in most inartistic language is *Johnson v. Johnson's widow and heirs*, 1 Munf. 549, where the bequest was "I give and because . . . 120 acres, . . . 1 cow, 1 calf," etc.; and the court held that, as the testator was evidently an illiterate person, and used the same words to designate the interest he desired to bequeath in his real, as in his personal, property, his intention was to give an absolute interest in both, and a fee-simple would be taken in the land.

Effect of Preamble showing Intent to Dispose of Entire Estate.

There is a large class of cases in which the estate devised has been held to be enlarged to a fee-simple by an intention, shown in the preamble of the will, to dispose of the entire estate of the testator, taken in connection with words according with that intent, contained in the devise itself. With regard to the effect of an introductory clause, Chief-Justice TILGHMAN, in *Steele v. Thompson*, said: "There have been various opinions concerning the inferences which may be drawn from the introduction of a will, where it expresses an intent to dispose of the whole estate. In connection with other circumstances, such an introduction may be worthy of consideration, but the better opinion seems to be, that there is not much in it, because it is generally considered by the drawer of the will as matter of form, and put down before he begins to express the will of the testator; and because it cannot be doubted that most men, when they make their wills, do intend to dispose of their whole estate, whether they say so or not;" and in *Waring v. Middleton*, 3 Des. Eq. 249, Chancellor DESSAUSURE, also speaking of the introductory clause, said: "One of the scales must have been inclining downward before any use can effectively be made of it." In accord with the above expressions are many authorities. The rule as to the effect of an introductory clause in the construction of a will may be stated as follows:

The intention of the testator to dispose of his entire estate, shown by the introductory clause of a will, is never sufficient by itself to enlarge a devise without words of limitation to a fee-simple; but the intention to dispose of the entire estate being shown in such clause, it will determine the court to decide an estate to be enlarged to a fee, in a case where there exist, in the devise under consideration, expressions tending, when taken in connection with the words in the introductory clause, to show an intent on the part of the testator to devise a fee, which expressions, taken by themselves, would not be considered as showing with sufficient clearness an intent to give such an estate, and where, if the doubtful devise were construed as giving a life estate only, the testator would have died intestate as to part of his property. *Lippett v. Hopkins*, 1 Gall. 455; *Jackson v. Harris*, 8 Johns. 141; *Fox v. Phelps*, 17 Wend. 393; *Barheydt v. Barheydt*, 20 Id. 576; *Hogan v. Andrews*, 23 Id. 452; *Van Derzee v. Van Derzee*, 30 Barb. 331, 36 N. Y. 231; *Olmsted v. Harvey*, 1 Barb. 102, S. C. 1 N. Y. (Comst.) 483; *Cassell v. Cooke*, 8 S. & R. 268; *McIntyre v. Ramsey*, 23 Pa. St. 317; *Rupp v. Eberly*, 79 Id. 141; *Butler v. Little*, 3 Me. 239; *Beall v. Holmes*, 6 H. & J. 210; *Lessee of Ferguson v. Zepp*, 4 Wash. C. C. 645.

To give the effect of enlargement to a fee, there must be words in the

devise itself, connected in terms or sense with the introductory clause, and they must import more than a mere description of property, *Barheydt v. Barheydt*; *Hogan v. Andrews*; *Lippett v. Hopkins*; *Van Derzee v. Van Derzee*; *Olmsted v. Harvey*.

The following terms in the preamble of a will, in connection with words showing that the testator contemplated their disposition or settlement, have been held as manifesting an intention to dispose of the entire estate of the testator, and being construed with doubtful devising clauses have been allowed to enlarge an estate to a fee: "my estate," *Davies v. Miller*, 1 Call 127; "all my temporal estate," *Watson v. Powell*, 3 Id. 306; "my worldly estate," *Peppard v. Deal*, 9 Pa. St. 140; "my worldly affairs," *Walker v. Walker*, 28 Id. 40; "worldly effects, both real and personal," *Doughty v. Browne*, 4 Yeates 179; "worldly goods," *Wyatt v. Sadler's Heirs*, 1 Munf. 537; *Kennon v. McRobert*, 1 Wash. (Va.) 126; "temporal goods," *Goodrich v. Harding*, 3 Rand. 280. The evidence of intention to give a fee is much strengthened when, in addition to being preceded by an introductory clause, showing an intention to dispose of the whole estate, the devise, without words of limitation, is followed by a conclusion which shows that the testator is of opinion that he has disposed of his entire property, as in *Davies v. Miller*, *supra*, "this is my will, and the way I desire my estate to be disposed of."

Intention to Give Fee Discovered by Comparison of Devise with Others in the Same Will.

An intention to devise a fee is sometimes discovered from a comparison of the devise under consideration with others in the same will. Thus where a testator shows a desire to give equal estates to devisees, standing to him in the same relation, and the devises to all but one are expressly in fee, and the devise to the remaining one is to him generally, there being nothing to show that the omission of the words of inheritance was made with a purpose, the devisee will be held to take a fee, *Cook v. Holmes*, 11 Mass. 528. And where a devise was made to a son, A., without words of inheritance, and a legacy was left to the children of a deceased son B., "which [legacy] is his proportion of the estate," and there was an intent manifest in the preamble of the will to dispose of the entire estate, it was held that A. would take a fee-simple, since, otherwise, the children of B. would receive more than their father's proportion, which was all that an intention to give them could be found in the will, *Butler v. Little*, *supra*. The fact, however, that a will contains a small legacy to the heir-at-law will not be sufficient to enlarge a devise to another to a fee-simple, *Clayton v. Clayton*, 3 Binn. 476. See

also, for another instance of construction by comparison, *Hall v. Dickinson*, 1 Grant Cas. 240.

Enlargement of Devise in Trust by Requirement of Trust.

Where the will makes a devise on a trust which may require for its execution a fee-simple, a fee-simple will be vested in the trustee, *Deering v. Adams*, 37 Me. 264; *Hardy v. Redman's Admr.*, 3 Cr. Cir. 635; *Kirkland v. Cox*, 94 Ill. 400.

Enlargement by Implication from Control given over the Land Devised.

In some cases a fee will be raised by implication from the control over the land given to the devisee. Thus a devise of an estate to be at the "absolute disposal" of the devisee will vest a fee, *Jackson v. Babcock*, 12 Johns. 389; so, where the "entire disposal" is given, even if there be a devise over on the death of the first taker, *McDonald v. Walgrove*, 1 Sand. Ch. 274; *McLean v. MacDonald*, 2 Barb. 534; or, where the devise is to one "for her sole and absolute use and disposal," *Terry v. Wiggins*, 47 N. Y. 512; or, "to be disposed of at the pleasure of the devisee," *Jackson v. Coleman*, 2 Johns. 391; or, "that the devisee may manage the estate as though she were entire and sole owner," *Markillie v. Ragland*, 77 Ill. 98. A general devise, to use and dispose of as the devisee may please, will give a fee, notwithstanding a devise over on the first devisee's death, *Benkert v. Jacoby*, 36 Iowa 273; but a devise, to have and hold and do with as she sees proper before her death, will give a life estate only, *Brant v. Virginia Coal and Iron Co.*, 16 Am. L. Reg., N. S. 403. A devise to "A., so long as she continues my widow; but if she marries, no more than the law allows; but if she continues my widow, she is to hold, enjoy, or dispose of it at her discretion as I do at present," gives a fee determinable on marriage, *Swope v. Swope*, 5 Gill. 225. A devise of land "to be freely possessed and enjoyed" will give a fee, *Campbell v. Carson*, 12 S. & R. 54, in which case the Supreme Court of Pennsylvania adopted the meaning given to free enjoyment by Lord MANSFIELD in *Mudge's Lessee v. Blight*, Cowp. 352, *i. e.*, the absolute estate, and rejected the meanings given in later English cases—free from impeachment of waste, free from incumbrances. The law has, however, been held differently in New York. In *Wheaton v. Andress*, 23 Wend. 452, the testator, in the preamble, professed to make his will "as touching such worldly interest," etc., and then devised to his wife all his lands, by her "freely to be possessed and enjoyed." The court held that this devise gave

but a life estate. COWEN, J., in his opinion, said: "No case holds that [the introductory clause, manifesting an intent to dispose of the entire estate of the testator] simply connected with the words freely to be enjoyed, etc., the whole will carry a fee. To do this when there are no words of express limitation, all the cases agree that the will should contain some provision in respect to the land, necessarily inconsistent with the estate being for life. Freely to be enjoyed, etc., may come much short of this." His Honor pointed out that in *Denn ex d. Gaskin v. Gaskin*, Cowp. 657, and *Wright ex d. Shaw v. Russell*, Id. (cited by counsel), a disinheriting legacy had been given to the heir-at-law, and that the authority of the cases had been weakened by the opinions and comments of Lord ELLENBOROUGH and LE BLANC and DREURY, J. J., in *Goodright ex d. Drewry v. Barron*, 11 East. 220. A devise of land, to dispose of as the devisee may think best while she survives, and that any disposition she may make at her death shall be duly and strictly attended to, and stand good in law, will give a fee, *Moore v. Webb*, 2 B. Mon. 282. An express devise for life will not be enlarged to a fee by the mere addition of a power of sale, *Sawyer v. Dozier*, 7 Jones N. C. Law. 7; *Dean v. Nunnally*, 36 Miss. 358; *Lewis v. Palmer*, 46 Conn. 454; *Maltby's Appeal*, 47 Id. 349; nor by the addition to the power of disposal of a power to reinvest the proceeds without accountability, *Cockrill v. Maney*, 2 Tenn. Ch. 49. The rule, with regard to this branch of the subject, laid down by the authorities is, that a devise for life, expressly with a power of disposition, gives to the devisee but a life estate with a power annexed; but an estate given by a general devise, without words of limitation, will be enlarged to a fee simple by the addition of a power of disposal, *Flintham's Appeal*, 11 S. & R. 18; *Jackson v. Robins*, 16 Johns. 537; *Rail v. Dotson*, 14 S. & M. 183; *Dean v. Nunnally*, 36 Miss. 358; *Andrews v. Brumfield*, 44 Id. 4957; *Hall v. Preble*, 68 Id. 100; *Rubey v. Barnett*, 12 Mo. 3; *Bryant v. Christian*, 58 Id. 98; *Smith v. Fulkinson*, 25 Pa. St. 109; *Baden v. Downey*, 36 N. J. Law 74, 460; *Fairman v. Beal*, 14 Ill. 244; *Funk v. Eggleston*, 92 Id. 515; *Benesch v. Clark*, 49 Md. 497. In Virginia, however, it has been held that a devise for life expressly, if followed by an absolute power of disposition, will vest a fee, *May v. Jaynes*, 20 Gratt. 692; see also *Missionary Society v. Calvert's Admr.*, 32 Id. 357, and *Reynolds v. Lee*, 12 Reporter 702. This, however, seems contrary to the current of decisions.

Effect of a Devise Over.

A devise over without words of limitation is not enlarged to a fee-simple by the mere fact that it is a devise after a life estate, *Van Derzee v. Van*

Derzee, 30 Barb. 331, 36 N. Y. 231; *Ferris v. Smith*, 17 Johns 221; *Edwards v. Bishop*, 4 Comst. 61; *Wilson v. Wilson*, 4 T. B. M. 159; but a devise over, contingent on the death of the first taker without issue, will carry a fee, *Morris v. Potter*, 10 R. I. 58.

A fee in the first taker may be implied from a devise to one, and, in case of failure of heirs, then over, *Daniel v. Manama*, 1 Bush. 544; *Niles v. Gray*, 12 Ohio St. 320; *Den ex d. Hollowell v. Kornegay*, 7 Ired. Law 261; *Armstrong v. Zane's Heirs*, 12 Ohio 287; in *Huntingdon v. Spalding*, 1 Day 8, the court gave the word "son" the force of "heir" in this connection; a fee may also be implied from a devise to several persons, with a provision that should any die without heirs their share should go to the survivor or survivors, *Richardson v. Noyes*, 2 Mass. 56; *Taylor v. Foster's Admr.*, 17 Ohio St. 166; *Abbott v. Essex Co.*, 18 How. 202. In *King's Heirs v. King's Administrator*, 12 Ohio 390, a devise of "all my property to be used by C. while he lives, and should he die without heirs lawfully born, I then will what may be considered my share unto A. and B.," was held to give a fee; but in *Lessee of Willis v. Bucher*, 3 Wash. C. C. 369, a devise to A., "and if A. die without heir or issue," was held to be only a devise in tail, the word issue being interpreted as in the sense of heirs of the body and reducing the fee.

A general devise with a remainder over contingent upon the death of the first taker within a given age, will vest a fee in the first taker. "It is a settled principle that when an estate is devised to one generally, with a remainder over upon a limited contingency, as upon his dying under twenty-one years of age, the first devisee shall take a fee-simple, for if the intent were to give only a life estate with remainder over there could be no reason for limiting to the death under age," per STORY, J., *Lippett v. Hopkins*, 1 Gall. 455. See also *Gray v. Winkler*, 4 Jones (N. C.) Eq. 308, where it is also decided that the limitation over need not be in fee, *Cassell v. Cooke*, 8 S. & R. 268; *Carter v. Reddish*, 32 Ohio St. 1; *Scanlan v. Porter*, 1 Bail. 427. It seems that a fee is given by a devise to one when he comes to the full age of twenty-one years. *Devenish's Lessee v. Smith*, 1 H. & M. 148; *Carr v. Jeannerett*, 2 McCord 67; *sed vide Carr v. Green*, Id. 75; and this is not altered by the fact that it is uncertain who the devisee may be, as in the case of a devise "to the youngest child" of the testator "who attains twenty-one," *Brailsford v. Heyward*, 2 Des. 290.

Enlargement of Devise by a Charge upon the Devisee in Respect to the Devise.

Where land is devised to a person, and a charge is made by the will upon the devisee in respect to the devise, he will take a fee-simple, although the devise contain no words of inheritance or perpetuity. This rule proceeds upon the principle of an intended benefit to the devisee, which benefit might never accrue to him if the devise were limited to a life estate, for it might expire before he had been able to reimburse himself, from the land, the amount of the charge put upon him in respect thereto, *Cook v. Holmes*, 11 Mass. 528; *Harden v. Hays*, 9 Pa. St. 151; *Lindsay v. McCormack*, 2 A. K. M. 229; *King v. Cole*, 6 R. I. 584; *Farrar v. Ayres*, 5 Pick. 404.

A mere injunction to pay is not sufficient to enlarge the estate granted to a fee; there must be a positive charge in the will, *Fox v. Phelps*, 17 Wend. 393; the charge is frequently expressed as follows, to A., he paying, etc. The charge must be a *personal* one, and not a charge on the land. The distinction is thus stated by KENT, C. J., in *Jackson v. Bull*, 10 Johns 148, "The distinction which runs through the cases is that where the charge is upon the estate, and there are no words of limitation, the devisee takes only an estate for life; but where the charge is on the person of the devisee, in respect of the estate in his hands, he takes a fee on the principle that he might otherwise be a loser;" see also *Spraker v. Van Alstyne*, 18 Wend. 200; see also *Olmsted v. Olmsted*, 4 Comst. 56. A fee, therefore, will not be implied from a general charge on the testator's estate, *Jackson v. Bull*, *supra*; or from the devise of an estate charged with the debts of the testator, no special charge being made upon the devisee, *McLellan v. Turner*, 15 Me. 436; *Olmsted v. Harvey*, 1 Barb. 102; or from a devise to pay the funeral expenses and debts out of the proceeds of the estate devised, *Jackson v. Harris*, 8 Johns. 141; *Doe v. Harter*, 7 Blackf. 488; or to pay certain sums out of the estate devised, *Funk v. Eggleston*, 92 Ill. 517; or from a general direction to pay debts, *Mooberry v. Marge*, 2 Munf. 453.

On the same principle, to wit, that the reason of holding a general devise, accompanied by a personal charge is equivalent to a devise in fee, is that an indemnity may be afforded to the devisee against possible loss, it is held that even where there is a personal charge upon the devisee, yet if the testator has provided a fund to which the devisee may look for indemnity against the charge upon him, the devise will not be enlarged to a fee, *Burlingham v. Belding*, 21 Wend. 463.

Where there is a personal charge, and no indemnity is provided, the enlargement of the devisee's estate will not be prevented by the fact that the sum charged upon the devisee is very small in amount, *Jackson v. Mer-*

rill, 6 Johns. 185; *Gibson v. Horton*, 5 H. & J. 177; *King v. Cole*, 6 R. I. 584; or that the time of its payment is postponed, *Doe d. Harrington v. Dill*, 1 Hous. 398; *Harden v. Hays*, *supra*; or even contingent on the arrival at a certain age of the person to whom payment is to be made, *Doe d. Harrington v. Dill*, *supra*.

The charge may be to pay certain legacies, *Barheydt v. Barheydt*, 20 Wend. 500; or an annuity, *Jones's Ex'rs v. Jones*, 2 Beas. 236. It need not be a direct money charge, but may impose an obligation to perform a certain duty, as to educate a minor, *Dumond v. Stringham*, 26 Barb. 104; or to give fire-wood or allow the use of a room to the testator's widow, *Jackson v. Martin*, 18 Johns. 31; or to surrender a claim or expectancy, as a devise to A., "provided he give up his right to all my land in C.," *Gibson v. Horton*, 5 H. & J. 177. Where land is devised generally with words of valuation, and there is a direction that the value shall be deducted from the share of the devisee in the residuum, a fee-simple will pass, *Baker v. Bridge*, 12 Pick. 27; so where there is a direction that the residuum shall be given to those who "get the worst lots of land," a fee will be implied in the land, *Pattison v. Doe d. Thompson*, 7 Ind. 282. Where, however, the devisee has received advancements from the testator to an amount exceeding the sum of the latter's debts, and the fact is adverted to in the will, and a bequest of the surplus of the advancements is made to the devisee, there a devise will not be enlarged to a fee by a direction that the devisee shall pay the debts, for there is really no charge upon the devisee at all, but the direction is a mere application of the testator's own funds to the payment of his debts, *Tanner v. Livingston*, 12 Wend. 83. A charge upon devisee in respect to the whole of a piece of land of which he receives a portion and another person another portion, may have the effect of enlarging the estates of both devisees to fees, as in *Barheydt v. Barheydt*, *supra*. The devise of the "upper half" of certain land to A. and the lower half to A.'s minor son, on condition that A. paid certain legacies, was held to give an estate in fee to both A. and his son.

Where a direction is inserted after an indefinite devise, that the devisee shall pay a certain sum to a legatee named, and the same person is appointed executor, the charge will be regarded as having relation to the devisee in his personal character, and not as executor, and hence will cause him to take a fee in the land devised, *Wharton v. Moragal*, 62 Ala. 201.

Where an estate less than a fee-simple is expressly limited, the rule is, that it will not be enlarged to a fee by a charge, *Dewitt v. Eldred*, 4 W. & S. 414; *Moore v. Dimond*, 5 R. I. 121. In *Saylor v. Kocher*, 3 W. & S. 165, however, the testator devised to his sons, "my leasehold estate in all those messuages," etc., subject to the payment by the sons of certain legacies.

In fact, the testator had no leasehold estates, but owned the property devised in fee. It was held that the sons took a fee. GIBSON, C. J., remarked: "Can it be doubted that the devise had regard to this land, or that he [the testator] intended to pass the fee, when it is considered that the devisees were burdened with the payment of the legacies?" In *Busby v. Busby*, 1 Dall. 226, a devise of land, without words of inheritance, to a widow, in lieu of her dower or third, was held not to give a fee.

Effect of Absence of Residuary Clause.

The absence of a residuary clause in a will, showing an intention to dispose of the whole of the testator's estate, has been allowed to have the effect of enlarging a devise to an estate in fee, *Shinn v. Holmes*, 25 Pa. 142; *Doe d. Harrington v. Dill*, 1 Houst. 398.

Reduction of Devise.

The intention of the testator is to be observed, not only when it enlarges an estate, but also when it cuts down what would otherwise have been a devise in fee, *Ellet v. Paxson*, 2 W. & S. 418. A fee, however, will not be held to be cut down by ambiguous words, *Ladd v. Whitney*, 117 Mass. 201; *Briggs v. Shaw*, 9 Allen 516, as where the devise is to A. in fee, but if he die, to B.; here the fee will not be cut down, but the provision for the devise over will be held to refer to death in the testator's lifetime. The fee will not be cut down by words restricting or forbidding the sale of the land by the devisee, even if followed by a devise over on the death of the first taker, *Reifsnnyder v. Hunter*, 19 Pa. St. 41; *Walker v. Vincent*, Id. 369; *Kepple's Appeal*, 53 Id. 211; *M' Cullough's Heirs v. Gilmore*, 11 Id. 370; or by a devise over on the death of the first taker without a son, *Melson v. Doe d. Cooper*, 4 Leigh 408; or by a provision that the profits of the land shall be applied to a particular purpose, *Thompson v. Swoope*, 24 Pa. St. 474; or by a proviso that the land devised shall not be left to a certain person, *Barnard v. Bailey*, 2 Harring. 56; or by precatory words to the effect that the devisee will leave the land to certain persons, or for certain uses, should he die without issue, or in any other contingency, *Batchelor v. Macon*, 69 N. C. 545; *Second Reformed Presbyterian Church v. Disbrow*, 52 Pa. St. 219; *Pennock's Estate*, 20 Id. 268; or by a provision that "should any of my children die without heirs, his bequeathed share shall revert," *Shutt v. Rambo*, 57 Pa. St. 149. The addition of the words "for life" to a devise of a fee-simple—I give to A. an estate "in fee-simple for life—" will not cut down the fee to a life estate, *McAllister v. Tate*, 11 Rich. 509; nor

will a proviso that if A. "should die without heirs of his body," then over, reduce a properly devised fee to a fee-tail, *Roser v. Slade*, 3 Md. Ch. 91. When a fee is given, the only effect of the words "for her sole and separate use during her life" will be to exclude the marital rights of a husband, leaving the estate in the devisee still a fee-simple, *Skillin v. Lloyd*, 6 Cold. 563. Where, after a devise in fee, the will provides that, if the devisee do not pay certain legacies, the executors may sell part, or all of the land devised, and there is no devise over, the fee will not be cut down, *Hanna's Appeal*, 31 Pa. St. 53. The addition to a devise in trust for B. and her heirs, of the words "for her and her heirs' sole use and benefit," will not destroy the equitable fee devised to B., *Korn v. Cutler*, 26 Conn. 4. In *Grant v. Carpenter*, 8 R. I. 36, after giving an estate in fee, the will went on to provide that, under certain circumstances the devisee might sell the estate: the court held that, although the testator evidently thought the estate he had given could not be disposed of without the subsequently granted power, still the will should not be construed as giving a life estate. The mere fact that an estate for life has been limited to a person is not a sufficient indication of intent that the devisee shall have a life estate only, to prevent a fee-simple in the same land being given to him by subsequent words, *Geyer v. Wentzel*, 68 Pa. St. 85.

Statutory Regulations.

Throughout the United States, statutes have been passed, which have greatly modified, if they have not overthrown, the rules of construction of devises of realty. They have all been in the direction of giving freer play to the intention of the devisor, and have given much greater latitude to courts, when engaged in the construction of wills, than was permitted by the rules of the common law. With regard to the question immediately before us, some of the statutes have merely destroyed all presumption arising from the omission of words of limitation; others have declared the presumption to be in favor of a gift of the fee, thus reversing the old rule; and others, still, have joined with this omission other circumstances, as necessary to create a presumption.

New Jersey seems to have taken the lead in this species of legislation, and its statute, passed as early as 1784, provides that, "all devises in which the words 'heirs and assigns,' or 'heirs and assigns forever' are omitted, and no expressions are contained in such will or testament whereby it shall appear that such devise was intended to convey only an estate for life, and no further devise thereof being made of the devised premises after the death of the devisee, to whom the same shall be given; all such devises shall be taken

and understood to be the intention of the testator thereby to grant and devise an absolute estate in the same; and shall be construed, deemed, and adjudged in all courts of law and equity in this State to convey an estate in fee-simple to the devisee for all such devised premises, in as full a manner as if the same had been given or devised to such devisee, and to his heirs and assigns forever, any law, usage, or custom to the contrary notwithstanding." Revision of 1878, p. 300, ch. 41, § 47. The Oregon statute is apparently a transcript of the efficient part of the foregoing statute. Gen. Law of Oregon of 1872, ch. 64, § 47.

The Pennsylvania statute is to the same effect, but more succinctly expressed: "All devises of real estate shall pass the whole estate of the testator in the premises devised, although there be no words of inheritance or of perpetuity, unless it appear by a devise over, or by words of limitation or otherwise in the will, that the testator intended to devise a less estate." Act April 8, 1833, § 9, Pur. Dig., Vol. 2, p. 1475, pl. 10.

The statutes of Delaware, Rev. St. ed. 1874, ch. lxxxix, § 24; Kansas, Comp. Laws 1879, ch. 117, § 54; Massachusetts, Rev. St. 1858, pt. II., Tit. III.; Michigan, Rev. St. 1857, ch. 92, § 2, par. 2826; Maine, Rev. St., ch. 74, § 16; Minnesota, 1 St. at Large 646, Tit. 1, ch. 35 (Bissell, 1873); Rhode Island, Gen. St., Tit. xxix., ch. 171, § 5; Virginia, Code 1873, ch. 112, § 7; West Virginia, Rev. St., ch. 82, § 8; New Hampshire, Rev. St., ch. 193, § 5; Ohio, Rev. St. 1880, Tit. II., § 5970; Vermont, Gen. St. 1862, ch. 49, § 3; Wisconsin, Rev. St., ch. 103, § 2278 provide, with but little variance of language, that every devise of land shall be construed to pass all the estate of the testator therein, which he could legally devise, unless the will show an intent to pass a less estate.

The statutes of Illinois, Rev. St. 1880, ch. 30, § 13 (Hurd's edition); Colorado, Gen. Laws, ch. xvii., § 7; and Texas, Pasch. Dig., Art. 999, declare that a devise shall be deemed to be intended in fee-simple, if a less estate be not limited by express words, or do not appear to have been devised by construction or operation of law.

The Maryland act, passed in 1825, Md. Code 1878, Art. 49, § 8, declares that by a devise without words of limitation or perpetuity, the entire and absolute estate of the devisor shall pass, unless it appear by a devise over, or words of limitation or otherwise, that a less estate is intended.

In Mississippi, by the Code, ch. 52, § 2284, it is provided that a devise without words of limitation shall transmit a fee-simple if a less estate be not limited by express words, or unless it clearly appear from the will that a less estate was intended.

In Missouri, Rev. St., ed. 1879, § 4004, by a devise as above, where there

are no express words showing an intention to give a life estate, and there is no devise over, a fee-simple is to be taken to have been intended.

In South Carolina a statute passed in 1824 declares that every devise shall be considered as in fee, unless such a construction be inconsistent with the will of the testator, express or implied.

In New York the statute is as follows, Rev. St., ch. vi., § 7: "Every will that shall be made by a testator in express terms of all his real estate, or in any other terms denoting his intent to devise all his real property, shall be construed to pass all the real estate which he was entitled to devise at the time of his death."

In North Carolina, by the terms of the Revised Code, ch. 119, § 26, every devise shall be construed as in fee-simple, unless such devise shall in plain and express words show, or it shall be plainly intended by the will, that the testator intended to convey an estate of less dignity. The Tennessee statute, Code § 2006, is to the same effect.

In Kentucky a devise will carry the entire estate of the testator, unless a less estate is limited by express words or by necessary implication, Rev. St., ch. 80, § 7.

Words of limitation are rendered unnecessary in a devise in Alabama, Code § 2178; Iowa, Rev. of 1860, ch. 95, § 2208; and Indiana, Rev. St. 1843, § 488.

The statute of Georgia goes farther than any other. It provides (Code 1873, § 2248, Act of 1821) that a fee shall pass without words of limitation, unless a less estate is limited; that if a less estate is expressly limited, the courts shall not, by construction, enlarge such estate into a fee, but, disregarding all technicalities, shall give effect to the will of the testator so far as the same is lawful, if it can be gathered from the contents of the instrument, and if not the court may resort to parol testimony.

Interpretation of Devises since Statutes.

The above, it will be seen, all tend in the same direction, differing only in the respects pointed out. The interpretation, therefore, in many respects, of a will made in any state since the enactment of the statute upon that subject, will be governed by a different rule than that applied to a will antedating the statute. In South Carolina, indeed, it has been held otherwise, and there the statute has been considered as merely declaratory, and therefore retroactive, *Peyton v. Smith*, 4 McC. 476; *Hall v. Goodwyn*, Id. 442, which two cases seem to overrule *Boatwright v. Faust*, Id. 439, wherein a contrary position was taken; but this is believed to be the only State where the law is so held.

Since the statutes, the words "heirs and assigns" are not only unneces-

sary to pass a fee, but their absence is not even evidence of intention on the part of the testator to give less than a fee, *Baldwin v. Bean*, 59 Me. 481; and as the presumption now is in favor of a fee being given, it is not now sufficient that the testator's intention appear doubtful in order to persuade a court to hold that a life estate and not a fee-simple is given to the devisee, *Shirey v. Postlethwaite*, 72 Pa. St. 39. In Illinois the presumption has been carried so far, that a devise that A. administer, and if there be not sufficient personalty to pay all just demands that he shall sell such of the real estate as he shall think advantageous, has been construed as giving a fee, *McConnel v. Smith*, 23 Ill. 611. A limitation over after the death of a devisee to whom a general devise has been made, does not, under the statute of Pennsylvania, in which it will be recollected a devise over is recited as one of the means by which an intention to give a life estate may be recognized, reduce the fee where the limitation over is to the children and heirs of the devisee, *Williams v. Leech*, 28 Pa. St. 89; *Naglee's Appeal*, 33 Id. 89. The word "use" in a devise will not necessarily show an intent that the fee shall not pass, as "I give to my son V. the use of that part of the farm," etc., *Hance v. West*, 32 N. J. Law, 233; but a devise of an entire estate, *durante viduitate*, "but in case of marriage I give only one-half of my property, which goes for her support during her natural life, and the other half to my brothers or their heirs," was held to give a life estate only in the half devised to the widow, on her remarriage, the court regarding the intent of the testator, as shown by the word "only," manifesting an intention that the after devised should be of the same character as the first devised estate, and the fact that the widow's support during her life was the recited object of the devise, *Sheldon v. Rose*, 41 Conn. 371. A devise, however, for the devisee's "own individual purposes and property to have for her benefit to enable her to support her three infant children," is not reduced to a life estate by the recital of the object of the devise being the support of the children, *Davis v. Bawcum*, 10 Heisk 406. A devise to one "and her children, the children taking their mother's share," has been held to show an intention that the mother should take a life estate only, *Estate of I. R. Smith*, 9 Phila. 348. A general devise, followed by a declaration that the land should not be encumbered or sold by the devisees, but remain free for their children, but the devisees should have the use, income, and profits during life, with power to make wills disposing of the land, has been held to give to the devisees a life estate only, *Urlich v. Merkel*, 81 Pa. St. 332.

There are cases of enlargement of an estate, in terms for life, to a fee by virtue of the rule in *Shelly's case*, both when the estate is created by devise and when it is created by deed. These will be found treated in their proper place in the note upon that rule.

Estate Tail—Creation of: Incidents; Statutory Regulations.

ALLIN AND WIFE v. BUNCE.

*Hartford Superior Court and Supreme Court of Errors of
Connecticut, A. D. 1785.*

[Reported in 1 Root 96.]

A devise to a man and the heirs of his body lawfully begotten forever creates a fee-tail.

Action of ejectment for a piece of land. The case from the declaration and pleadings was thus—Capt. Knowles of Hartford, in and by his last will and testament, dated the 30th of Nov. A. D. 1753, devised certain lands, including the demanded premises, to his son Samuel and to the heirs of his body forever. The testator died and his will was proved and approved. Samuel Knowles, the devisee, married and had heirs of his body, the plaintiff's wife being one, and then said Samuel sold and conveyed the estate in fee to the defendant, and is since dead.

The question made in this case was—whether this was a fee conditional in Samuel the son, or a fee-tail.

By the court it was adjudged to be a fee-tail in Samuel the son, and the plaintiff had judgment for the land demanded.

The case of *John Kimberly v. Hale*, adjudged at Hartford on a special verdict, was quoted, in which case the jury found the following facts in a special verdict, viz.: that in April A. D. 1727, Samuel Smith, Sr., made a settlement of his estate to certain uses, viz., first to himself for life, then to his son Samuel and the heirs of his body lawfully begotten; and in default of such heirs to his son Joseph and the heirs of his body lawfully begotten; and in default of such heirs then to his own right heirs. That Samuel, Sr., died, and Samuel the son entered into said estate and was seized; and without having any heirs of his body, in A. D. 1734 he conveyed said estate to his sister Rachel; that thereupon said Rachel entered and was possessed, and under her the plaintiff claims. That in A. D. 1749 Samuel the younger died without heirs of his body, and that thereupon the said Joseph Smith entered upon the

estate, claiming the same as tenant in tail by force of the deed of settlement aforesaid, and leased it to the defendant for a term not yet expired; who entered and did the facts complained of in the plaintiff's declaration.

And thereupon put the question of law to the court upon the facts aforesaid—whether the said Joseph Smith and the defendant under him had right to enter into said land, etc. The court adjudged that the said Joseph Smith, and the defendant under him, had right to enter into said land; and thereupon, judgment was for the plaintiff to recover.

The case was carried, by a writ of error, to the supreme court of errors, and the judgment of the superior court was affirmed.

LESSEE OF HALL v. VANDEGRIFT.

Supreme Court of Pennsylvania.

[Reported in 3 Binney 373.]

A devise to A, “and his lawful begotten *heir* forever” is an estate tail in A. It is sufficiently clear that in a will, if not in a deed, *heir* is *nomen collectivum*, and the same as heirs.

It is not necessary that the body from which the issue is to come should be mentioned in express terms, in order to make a good estate tail. It is sufficient if the intention of the testator appears with reasonable certainty.

It is the spirit of the act of limitations to allow twenty-one years from the time that a person might make an entry and support an action, the statute not stopping after it has begun to run, in consequence of infancy coverture or any other disability. But if a party has not a right of entry, but only a possibility which may give a right of entry at a future day, the statute does not run against him until that right accrues. Hence, notwithstanding the next heir in tail releases to the tenant in tail in possession, the statute does not run against the releasor until the death of the tenant in tail without issue.

This was an ejectment, in which the following case was stated for the court's opinion:

Sarah Malloves, being seized in fee of the premises in the declaration, on the 16th December, 1723, duly made and published her last will and testament in writing, bearing date the day and year aforesaid,

and therein devised as follows: "*Imprimis* I give and bequeath to my kinsman Solomon Hall ten pounds in lawful money, likewise sixty acres of woodland joining on the northeast side the plantation he now dwells on, *I give to him and his lawful begotten HAIRE forever.*"—"Item I give unto my negro boy Toby, when he arrives at the age of twenty-four years of age, the sum of ten pounds lawful money, likewise ten acres of land lying at the north corner of my land, to have *during his life.*"—"Item I give and bequeath to my kinsman Joseph Hall, and to *his lawful heirs forever*, all my plantation that I have not before given, with all its improvements thereon, I give and bequeath to my kinsman Joseph Hall and his lawful heirs forever. And for the love and affection I do bear unto my kinsman Joseph Hall, I do give and bequeath unto the aforesaid Joseph Hall, all the *reversion* of what I have herein before given of my estate both real and personal, or of what kind or nature soever they be, I give unto my said kinsman Joseph Hall *and his heirs forever.*"

The testatrix died seized as aforesaid, without altering or revoking her said will, Solomon Hall, the devisee therein mentioned, surviving her.

Solomon Hall the devisee, after the death of Sarah Mallowes, entered into the premises, and died seized thereof, leaving lawful issue^s four children, to wit, John Hall his eldest son, Solomon Hall his second son, and two daughters—Sarah, who intermarried with David Davis, and Mary Hall.

After the death of Solomon Hall, the said John entered upon the premises, and about the latter end of 1785, or beginning of 1786, died without issue, his brother Solomon above mentioned, who was his heir at law, surviving him.

On the 18th of May, 1786, the said Solomon Hall last mentioned died, leaving lawful issue Jacob Hall, his eldest son and heir at law, the lessor of the plaintiff, and five other children.

The defendants are in possession; and they and those under whom they claim have been in possession of the premises in the said will of Sarah Mallowes mentioned, and devised as aforesaid, ever since her death, and claim the same by force and virtue of the following deeds, will, and conveyances.

On the 30th August, 1750, William West and Elizabeth his wife (who was the widow of Solomon Hall the devisee of Sarah Mallowes), Solomon Hall one of the sons of Solomon the devisee, David Davis

and Sarah his wife, one of the daughters of the said Solomon the devisee, and Mary Hall another daughter of the said Solomon the devisee, released all their right and title to the property devised by Sarah Mallowes as above stated, unto John Hall eldest son and heir at law of Solomon Hall the devisee of Sarah Mallowes, in fee, with a warranty against all claiming under them. [The deed was in these words, "have granted, remised, released, and confirmed, and do grant, remise, release, and confirm to the said John Hall, his heirs and assigns, etc."]

On the 26th April, 1754, John Hall and wife conveyed the above premises to Benjamin Britton in fee. [And the case then proceeded to deduce the title down to the defendants.]

The question for the opinion of the court was, whether the plaintiff was entitled to recover.

It was argued first in December term last by *Condy* for the plaintiff, and by *Rush* and *Hopkinson* for the defendants.

For the plaintiff. The plaintiff claims as heir in tail of Solomon Hall, under the will of Sarah Mallowes. If Solomon took an estate tail under that will, we are entitled to recover, otherwise not. The word *heir*, in the singular number, is the only thing which can create a doubt; but we think it perfectly well settled, that *heir* is *nomen collectivum*, and both in wills and deeds equivalent to *heirs*; certainly it is so in a will. The opinion of Lord Coke is known to be the other way. He says that if land be given to a man and his *heir*, in the singular number, he hath but an estate for life. The reason which he gives for it is, however, a bad one—"his heir cannot take a fee-simple by descent, because he is but one, and therefore in that case his heir shall take nothing." This reason evidently begs the question; for his heir we say is not one, but all who at different times stand in that relation. Accordingly his learned commentator puts against that opinion many authorities, that as well in a deed as a will, *heir* may operate in the same manners as *heirs*, in the plural. Co. Litt. 8, b, note 4. Lord Coke himself, in a subsequent page, agrees that "heir in the singular number *in a special case* may create an estate tail, as appeareth by 39 Ass., p. 20," where lands were given to a man and to his wife, and to one heir of their bodies lawfully begotten, and to one heir of the body of that heir only. This was held to be an estate tail, although to use Lord Coke's language, it was much

more *coarcted* or restrained than the present. Co. Litt. 22 a. In *Richardson v. Yardley*, Moore 397, case 519, Popham says, if land be devised to one for life, and after to his *heir* male, it is tail. The point was expressly decided in *Clerk v. Day*, Cro. Eliz. 313. All the justices, says the reporter, agreed that a devise to one and the *heir* of his body is an estate tail; "for heir is *nomen collectivum*, and one can have but one heir at one time, and this shall go from heir to heir." To the same point is *Whiting v. Wilkins*, 1 Bulstr. 219, which was a devise to Robert Whiting the testator's son *in perpetuum*, and after his decease the remainder to his *heir* male *in perpetuum*; and it was held by the whole court to be a good estate tail in Robert. So 1 Roll. Abr. 832, Estate K. pl. 1, a gift to one and his *heir* was held to be a fee in the donee; and in *Dubber v. Trollop*, 8 Vin. 233, pl. 13, Lord Coke's opinion is denied to be law by Chief Justice Eyre in delivering the opinion of the court.

If it be objected that the body from which the heir must proceed is not particularly indicated in this case, it is answered that it appears with sufficient certainty. To Solomon Hall and his lawful begotten heir, is the same as to him and his heir by him lawfully begotten. It is not necessary to use the words *de corpore*. In *Church v. Wyatt*, Moore 637, case 877, the devise was to A, *et hæredibus suis legitime procreatis*, which is precisely the present devise. And in *Barret v. Beckford*, 1 Ves. 521, which was a devise to A and his legitimate heirs, Lord Chancellor Hardwicke says in terms, the proper construction of *legitimate heirs* is heirs of his body lawfully begotten; for if to him and his heirs lawfully begotten, *that would be heirs of his body*. The difference between a lawful and an illegitimate heir occurs only when the particular parent is referred to. In such a case lawfully begotten heir means issue.

The testatrix intended to keep this estate in the line of Solomon Hall. Though illiterate, she knew the difference between estates. To Toby she gives an estate for life, and to Joseph Hall a fee-simple, in legal terms. When she spoke of lawfully begotten heirs, she must therefore have intended the lawful issue of Solomon. Joseph was the peculiar object of her bounty, not Solomon. She gave a fee-simple to him in a part of her farm, and the *reversion* of what she had before given of her estate, which was the life estate to Toby, and the estate tail to Solomon. This is very strong to show that she did not intend the entire fee should go to Solomon.

For the defendants. This case is not entitled to favor. The spirit of our code is opposed to this restricted inheritance, and has brought the distinction between a fee-simple and a fee-tail to a mere name, by authorizing the tenant in tail to bar the issue by a deed of bargain and sale. The estate in question has moreover been considered a fee-simple since 1723. It has been sold as such to *bona fide* purchasers for a valuable consideration; and the plaintiff claims not only against them, but against the deed of his father. The words in this will do not in their proper and legal acceptance create a tail; and words must be taken in this way in a will as well as in a deed, unless there is a plain intent to the contrary. If therefore there is nothing like such a plain intent in this will, the consequence must follow that there is no tail. Whether Solomon Hall took for life or in fee is of no consequence; either way the plaintiff cannot recover.

Blackstone defines an estate tail in general to be, where lands and tenements are given to one and the heirs of *his* body begotten. Two things therefore are necessary; words of inheritance, and words limiting that inheritance to the heirs of a particular body. 2 Bl. Comm. 113. No case has been shown where these have been dispensed with in a deed; and it is not conceded that any such case can be shown. On the contrary there is no doubt, that for want of certainty as to the body, these words in a deed would not amount to an estate tail, but to a fee-simple or an estate for life. *Abraham v. Twigg*, Cro. Eliz. 478, is in point that they would not. The deed there was to A and his heirs males lawfully engendered; and held that it was not tail. But greater indulgence is shown to wills, if the intention of the testator plainly requires it. Still it must be a certain and manifest intention, or the legal import of the words must prevail. Wild's case, 6 Rep. 16 b. To a man and his seed, or the like, is a good tail in a will. But there the body is designated. Here it is to Solomon Hall and his lawful begotten heir. What is the difference between this and his lawful heir? Does it necessarily mean, begotten by him? Not at all. Any legitimate heir, or in fact any heir of Solomon Hall, is his lawfully begotten heir. There is therefore no evidence of plain intention, because the words will answer for a fee at least as well as for an estate tail. Indeed the intention must be presumed to have been in favor of a fee. Ignorant people uniformly mean to give the whole, where they do not expressly and plainly limit the gift, as the testatrix did in the present will, where she gave Toby an

estate for life. She probably never heard of an estate tail, and did not know what it was. She takes no particular care of the issue of Solomon, but leaves the whole subject to his disposition, at least by some species of conveyance; and what emphatically shows her intention to part with the whole estate is her closing the devise by the words *forever*. To suppose that the testatrix knew that these terms would limit the inheritance to any other description of Solomon's heirs, than those born in wedlock in some branch or other of his family, and that the estate would upon a certain event cease, is to attribute to her an intimacy with law, which is impossible, and which the will disproves throughout. Reversion is of no importance here. The life estate of Toby was enough for that to operate upon.

No case cited for the plaintiff comes up to this. Mr. Hargrave in his note 2 to Co. Litt. 20 b, cites Moore, case 711, for the decision, that a devise to one *et hæredibus legitime procreatis* is tail; but the case of that number is in *prohibition*, and has nothing to do with the subject. In *Church v. Wyatt* there were other parts of the will of much more weight than the particular words in question; the estate being devised over, only in case the first devisee should die without *fruit of her body*. And in *Barret v. Beckford*, what Lord Hardwicke says, must be applied only to the case before him, where there was also a limitation over, if the first devisee *died without legitimate heirs*. These expressions unequivocally confined the issue to the body of the devisee, and therefore there was a plain intention in the testator that the inheritance should be restricted. Nothing of that kind exists here. The testatrix was anxious that the heirs should be lawful, but she did not care who got them.

Our. adv. vult.

The case was again argued at the present term, by Condry for the plaintiff, and by Tilghman for the defendants, upon the question, whether the defendants were not protected by the statute of limitations.

For the defendants it was said that the statute was founded in public convenience, and that its principle was so reasonable, that courts of equity had applied it to cases to which in strictness it did not extend. *Johnson v. Smith*, 2 Bur. 961; *Green v. Rivett*, 2 Salk. 421; *Eldridge v. Knott*, Cowp. 215; *Sir Thomas Standish v. Radley*, 2 Atk. 171. When it once begins to run, no disability of infancy, coverture, or the like, will

prevent its running on, until the limitation is out. *St. John v. Turner*, 1 Eq. Abr. 314 pl. 4; *Nevarre v. Rutton*, 2 Eq. Abr. 9 pl. 6. Hence if the statute began against Solomon Hall the younger, it will run against his issue, and the court will favor the application of it to protect such defendants as these.

Solomon Hall released to John his brother on the 30th of August, 1750. This release inured solely by way of extinguishment, as the releasee could not have the thing released. Litt. sec. 479, 480. It follows therefore that from the moment of the release there was a possession adverse to the estate tail of Solomon, which continued to the bringing of this action in 1804, and is a bar. If the release had passed any estate, I grant that during its continuance the statute would not have run against the grantor, because the possession would have been according to the grant. But it is not so where nothing passed, but the grant merely extinguished the right of the releasor.

For the plaintiff. There are two reasons against the application of the statute, first because it runs, in express terms, only from the time when the right or title to the same first descended or accrued. 2 St. Laws 28, Act of 26th March, 1785. Now Solomon Hall the younger could have no right or title to this estate until the death of John Hall without issue in 1785 or 1786, and twenty-one years did not elapse between that time and the commencement of the action. During John's life, Solomon had only a possibility to take the estate upon a future event, and therefore it was impossible for the plaintiff during John's life to do anything to obtain possession. Neither he nor his father was entitled to it. The statute was not intended to bar those who could not bring a suit. Besides, John and those claiming under him were in possession lawfully during John's life, and they could not elect to be in by wrong and adversely to us under the deed of Solomon. A *second* reason is, that if the argument were allowed, it would introduce a new mode of barring entails, never before heard of. The tenant in tail can bar his issue only by fine or recovery, or by lineal warranty with assets.

TILGHMAN, C. J.—The first question in this case is, what estate passed to Solomon Hall by the following devise in the will of Sarah Mallowses. "I give and bequeath to my kinsman Solomon Hall £10 in lawful money, likewise 60 acres of woodland, joining on the northeast side the

plantation he now dwells on, *I give to him and his lawful begotten heir forever*. The first reading of these words made a strong impression on my mind that the land was intended to go to the lawful issue of Solomon Hall; and that impression has been strengthened by the argument which we have heard and by subsequent reflection. I cannot think, that an unlettered person as the testatrix evidently was, would make a distinction between the expression "his lawful begotten heir," and "the heirs lawfully begotten by him." If the devise had been to him and to the heirs lawfully begotten by him, it would have been a clear estate tail.

I will consider the objections against an estate tail, and the authorities which have been cited. It is objected, that the words *forever* indicate an intent to give a fee. But these words are properly applied to an estate tail, because an estate tail may continue forever, and was, at common law, a fee-simple of a particular nature. It is next objected, that there can be no estate tail, because the devise is to the lawfully begotten *heir*, not *heirs*. Lord Coke, in 1 Inst. 8 b, does say, that a gift to A and his *heir* is only an estate for life; his opinion is upon a gift by deed, and therefore not strictly applicable to a devise. But even on a deed, the opinion of Coke is positively denied by Eyre C. J., in delivering the opinion of the court in *Dubber v. Trollop*, 8 Vin. 233, pl. 13. His expressions are, that "the opinion of Coke is not warranted by anything in Littleton, and is directly contrary to 39 Ass. s. 20, where lands were given to a man and his wife and *one heir* of their bodies, which was held to be an estate tail." In *Whiting v. Wilkins*, 1 Buls. 219, a devise to A forever, and after his decease to his *heir male* forever, was adjudged an estate tail. It is there said, that *heir male* and *heirs male* is all one, because *heir* is *nomen collectivum*. The plaintiff's counsel cited other cases to the same purpose, which it is unnecessary to notice, as the point is sufficiently clear. The last and principal objection is, that it is not expressed from whose body the heirs shall issue, but only that they shall be the heirs of Solomon Hall, and that they shall be lawfully begotten. The rule of law certainly is as laid down in 1 Black. Comm. 113, that to create an estate tail, it must appear from whose body the issue is to be. The question still recurs, does it not appear by this devise? It is sufficient, if the intention of the testator appears with reasonable certainty. But it is not necessary that the body from which the issue is to come should be mentioned in express terms. Why was the word *begotten* introduced into this devise, if not intended

to designate heirs begotten by the devisee? It is too far-fetched an idea to suppose that the testatrix looked to the *general* heir, and used the words *lawfully begotten* only to prevent any person *unlawfully* begotten from inheriting. The defendant's counsel think it unnatural that an ignorant woman should take it into her head to create an estate tail. I agree with them, that she might not think of an *estate tail*, because probably she did not know what it was. But it was very natural that she should wish to limit the estate to the issue of the devisee. The desire of confining property to a particular family seems deep rooted in the human breast. From whence this passion springs, which delights in exercising a kind of dominion over property after death, it is unnecessary to inquire. But the fact is, that we see it prevail in people of *all conditions*.

I have hitherto considered the intention of the testatrix, as appearing only from the words which I have mentioned. But there are other parts of the will which strengthen the idea of an estate tail. In the concluding paragraph the testatrix devises land to her kinsman Joseph Hall and to his *lawful heirs forever*. Also for the love and affection she bears him, she gives to him and *his heirs forever*, all the *reversion* of what she had before given of her estate both real and personal. Here it appears, that Joseph was her favorite, and that she knew how to give an absolute fee-simple, where she intended it. The devise of the *reversion* may it is true be satisfied, by referring it to a piece of land which had been given in the former part of the will, to the negro boy Toby expressly for *life*. But it may also be referred to the land devised to Solomon Hall, and at all events it leaves no ground for the argument which might otherwise have been raised, that a fee-simple was intended to Solomon, because there was no devise of the reversion.

These are the arguments which would have satisfied me, that Solomon took an estate tail, if no authorities could be produced on the subject. But we are not without respectable authority. Mr. Hargrave in his edition of Co. Litt. note 121, says, a devise "to one and his heirs lawfully begotten," is an estate tail; and he cites 43 Eliz. Rot. 1408; Moore, case 711. It is very true that nothing is to be found in Moore to support this opinion. There is certainly a mistake in the reference to Moore. Whether the original roll justifies Mr. Hargrave's citation, we are left to conjecture. In general he bears the character of a man of accuracy. But what has much greater weight with me is the opinion

of Lord Hardwicke in *Barret v. Beckford*, 1 Ves. 521, that a devise to one and *his heirs lawfully begotten*, means *heirs of his body*. The case decided by Lord Hardwicke did not turn on those words, but the opinion I have mentioned was given in the course of his argument. It is not of equal authority with an adjudged case, but considering the man from whom it came, it carries weight with it. Upon the whole I am well satisfied that Solomon Hall took an estate tail.

The second question is on the act of limitations, and will depend on the effect of the deed of the 30th August, 1750, from Solomon Hall deceased (father of the lessor of the plaintiff) to John Hall son and heir of Solomon the devisee. At the time of making this deed, John Hall was seized of the premises as tenant in tail, and Solomon (the grantor or lessor) was not seized of any estate, but had a possibility of becoming tenant in tail, in case of John's death without issue. The deed contains words of *grant*, as well as of *release*, and there was a small consideration of money. It is contended for the defendant, that this deed operated by way of *extinguishment* only, and that the act of limitations began to run from its date. If the grantor had any right capable of being transferred, the deed would operate as a *legal transfer* during his life. It would pass an estate in fee-simple, defeasible by the entry of his issue. It did not take away the right of entry of his issue, because it could not work a discontinuance of the estate tail. I cannot conceive that the act of limitations could take any effect, before the death of John Hall the grantee, because during his life he was rightfully seized of an estate tail. Immediately on his death, a right to the estate tail descended upon Solomon (the father of the lessor of the plaintiff) or would have descended on him, if he had not made the deed before mentioned. From that time there was a possession *adverse to the estate tail*, and from that time the act of limitations would run. This act made in the year 1785, enacts, that no person shall make an entry into any lands, etc., after the expiration of twenty-one years next after his title *first descended or accrued*, nor shall any person maintain any action for any lands, etc., of the seizin or possession of himself or his ancestors, or declare or allege any other seizin or possession of himself or his ancestors, than within twenty-one years next before the commencement of his suit. Now the right of the lessor of the plaintiff's father Solomon Hall, first descended or accrued on the death of John Hall his brother within twenty-one years before the commencement of the suit. At the

time of his making the deed, he had neither right nor title *accrued*, but only a possibility that it might thereafter accrue. It is the spirit of the act of limitations to allow twenty-one years from the time that a person might make an entry, or support an action; understanding always that when the twenty-one years once begin to run, they shall not be suspended by infancy, coverture, or any other circumstance. Upon this principle, the lessor of the plaintiff is not barred of his action. I am therefore of opinion, that he is entitled to a judgment.

YEATES, J.—It is admitted on all hands, that the words “*heirs of the body*” are the proper technical terms, to create an estate tail in all grants and gifts by deed; but it is also certain, that the precise expressions *de corpore* are not indispensably necessary in such cases to create an estate tail, so long as there are other words equivalent; as in a grant to “a man and his wife, and the heirs by them procreated,” or “to a man and his heirs which he should beget on the body of his wife,” etc., Co. Litt. 20 b, 7 Co. 41 b.

In wills the fundamental principle is, that the intention of the testator shall govern the construction; provided the estate devised be not inconsistent with the rules of law. It is a melancholy truth, that men too frequently postpone putting their houses in order, and making their final arrangements until the last moments of their existence. Hence the legal presumption arises, that in the performance of this solemn act they are ignorant of the law and without learned counsel; for which reason the law will execute their intention, if it can be plainly collected from the expressions they have made use of.

By recurring to the instrument before us, we find, that Sarah Mallowes the testatrix, bequeathed “to her kinsman Solomon Hall £10; likewise 60 acres of woodland adjoining on the northeast side the plantation he then dwelled on, she gave to *him and his lawful begotten haire forever*.” To her negro boy Toby, she gave 10 acres of land lying on the northeast corner of her land, to have *during his life*: “and to her kinsman Joseph Hall and to *his lawful heirs forever*, she gave all her plantation, that she had not before given, with all the improvements thereon to *him and his heirs forever*; and for the love and affection she had unto him, she gave and bequeathed to the aforesaid Joseph Hall, all the reversion of what she had therein before given of her estate both real and per-

sonal, or of what kind or nature soever unto her said kinsman Joseph Hall *and his heirs forever.*"

It appears, then, that Joseph Hall was the favorite object of her regard and affection; and that whoever penned the will, knew well how to describe an estate for life, as well as an estate in fee-simple. It would naturally occur to any one who reads this will, to inquire why in the devise to Joseph Hall the words used are *to him and his heirs forever*, and in the devise to Solomon *to him and his lawfully begotten heir forever*, if the testatrix meant to grant to each devisee a fee-simple? This difference of phraseology would seem to import a difference of intention; and this construction is fortified, in my idea, by the expressions "*his lawfully begotten heir.*" The pronoun *his* coupled with the other words, has the same signification as *by him* lawfully begotten, negating the idea of *collateral* heirs; and *heir* in the singular number, would seem to point to the individual heir at common law, claiming *per formam doni*, in contradistinction to the rules of descent established by our acts of assembly. At the same time, I freely admit, that *heir* may be *nomen collectivum* as well in deeds as wills, and operate in both in the same manner as *heirs* in the plural number, according to the authorities cited in Hargrave's note 4 to Co. Litt. 8 b. The expressions *forever* are often inserted in the formation of estates tail. The issue in tail may by possibility exist the same period of time as general heirs.

The case of *Abraham v. Twigg* was cited by the defendant's counsel from Cro. El. 478. It is said in the conclusion thereof, that in a devise, the words *of the body* must be expressed to make an estate tail. But this is contradicted by the whole current of authorities; and in a more full report of the same case in Moore 424, the instances of feoffments and wills are expressly distinguished from each other in this particular. The rule at law is, that in every estate tail, within the statute of Westm. 2, it must be limited either by express words, or words equipollent, of what body the heir inheritable shall issue. Co. Litt. 27 b. And if it be not expressed, it cannot be taken to be within the equity of the said statute; so that if the gift be to one and his heirs, females or males, the donee has a fee-simple. Litt. s. 31. The only question here therefore is, whether the testatrix has used sufficient words to limit the inheritance of the 60 acres of land in dispute to the issue of Solomon Hall. To the different abridgments for the several decisions on this subject, I refer. 10 Vin. 254; T. 5, Tail—3 Com. Dig. Devise N. 5, 26, 1st

ed.—2 Bac. Estate Tail B. 259, 1st ed. The expressions of Lord Hardwicke in *Barret v. Beckford*, 1 Ves. 521, are very strong. The proper construction of *legitimate heirs*, is heirs of his body lawfully begotten; for *if to him and his heirs lawfully begotten*, that would be heirs of his body.

But the case which most nearly resembles the present, is that of *Church v. Wyatt*, Moore 637, case 877; Hil. 37 Eliz. C. B. Rot. 1408, (which in Hargr. note 2, to Co. Litt. 20 b is called 43 Eliz., but in the same court, term, and roll.) There one seized of a copyhold inheritance, surrendered it to the use of his will; and having a daughter born, and a child in *ventre sa mère*, devised part of the land to his son or daughter in *ventre sa mère*, wherewith his wife was then going, and *hæredibus suis legitime procreatis*, and the residue he devised to his daughter born, to have to her and the fruit of her body, and if she should die without fruit of her body, remainder to the child in *ventre sa mère*, and if both should die *without fruit*, etc., then that J. S. should sell the lands; and he willed, that *one should be heir to the other*. And all the justices agreed that it was an estate tail in the daughter after born. It is true, that case was stronger than the one now before the court, by reason of the words *without fruit of their bodies*, and *that one should be heir to the other*. But we have the authority of Lord Chief Baron Comyns in the third volume of his Digest N. 5, Devise p. 26, 1st ed., that the words "*hæredibus suis legitime procreatis*," in a will, create an estate tail without other words; and Mr. Hargrave in his note before referred to, adopts the same opinion. The different operation of the same words in deeds and wills is strongly marked in *Idle v. Coke*, 2 L. Ray. 1144; 1 Wms. 70; Salk. 620; 11 Mod. 57; Holt 164; and conceiving here that the intent of the testator was plain and manifest, that the inheritance of the 60 acres in question was limited to the lawful issue of Solomon Hall, I am of opinion that he took an estate tail in the premises.

A second point has been made and argued during the present term. It has been objected that the plaintiff is barred from recovery of the premises by the act of limitations, the release of the 13th August, 1750, operating by way of extinguishment; that no interest whatever passed thereby, and the statute then attaching, it ran on notwithstanding subsequent infancy, coverture, etc. But the release of Solomon (the second) did pass his future contingent interest in case he should survive his elder brother John, and that the same John should die without issue.

Were this even otherwise, the plaintiff would not be barred. Previous to the act of 26th March, 1785, the statute of 32 Hen. 8, c. 9, and not the statute of 21 Jac. 1, c. 16, was held to be in force here. 1 Dall. 67. Now counting back from even December term, 1804 (when this ejectment was commenced) to August, 1754, only fifty-four years and four months would have elapsed, which is five years and eight months short of the period of time declared by the statute of 32 Hen. 8, c. 9, to operate as a bar.

If the devise to Solomon Hall was an estate in fee-tail, his eldest son John Hall and those holding under him, were entitled to the legal possession of the premises during the natural life of the said John Hall, and therefore they could not be considered as holding by an adverse title to the lessor of the plaintiff. The act of assembly of the 26th March, 1785, 2 St. Laws 281, was passed previous to the death of John Hall, as it is agreed that he died in the latter end of 1785 or beginning of 1786, and consequently the estate tail then descended on and accrued to him. Before this time he could make no legal entry, nor support an ejectment. The provisions therefore of the law of 1785 only can preclude him from recovering the lands in question. But his case is not embraced by the act, the second section enacting, "that from *henceforth* no person shall make entry into any manors, lands, etc., after the expiration of twenty-one years next after his right or title to the same *first descended or accrued*." There is an interval of nineteen years between 1785 and 1804, and therefore the act interposes no bar in the present case.

Whatever my private feelings may be in favor of innocent purchasers, I feel myself bound to give my voice that judgment be entered for the plaintiff.

BRACKENRIDGE, J.—To make this an estate tail there are wanting the words *of the body*; and it is only on the ground of an intention to entail, that the words used can be construed an entail; and this on the ground of an indulgence in a devise. But I do not believe that an estate of this nature was intended; and this from considering,

1. The rank and country of the devisor. Had she been of the gentry or nobility of England, I could more readily have inferred the family pride of preserving an estate unbroken, and continued in the succession

of a single heir. But the will in question was made in this State, and by an inhabitant of it.

2. The nature of the estate devised. It is not such a possession as one would suppose she could have had a wish to preserve undivided: a piece of woodland conterminal to the estate of the devisee; a strip of 60 acres, which if not given out and out, as we say in common parlance, would not so well suit the estate which he had adjoining.

3. I cannot easily suppose that if she had considered it an estate tail, there would not have been some understanding of it in the immediate devisee, and his family, and some tradition respecting it; whereas it appears not to have been thought of on the son of the devisee taking. Else why releases from the other children, if as heir in tail he could alone take? Or why not bar before alienation? It is evident that it did not come into his mind, or of those concerned at that day, that it was not a fee-simple.

The reversion she bequeaths to Joseph Hall, is satisfied by referring to the life estate in the devise immediately preceding to the boy Toby; so that it will not be necessary to construe this an estate tail in order to constitute a reversion.

But from *the terms* of the devise, must not an intention be inferred of devising in tail? No. The language of the will is that of a half learned person, with *motes of law terms glimmering in his brain*; but without seeming to know the use of each, in its particular place. *Lawful heir, begotten heir*, used now, and omitted again, carries with it evidence to me, of one who was aiming at the diction of the learned; or having an idea that certain terms of art were necessary in a will, without knowing where to place them.

But are not the terms such as are peculiarly applicable to an estate tail? The word heir in the singular number (for I will read it *heir*, though it is spelt *haire*) and the word *begotten*. Agreed. But there is the word "*forever*," that is destructive of their special meaning, and goes to the fee-simple. It is the natural adjunct of a fee-simple, and inconsistent with an estate tail; which, in the nature of it, is not supposed to last *forever*, but to be revertible to him from whom it came. An estate tail freely given, yet *would be raised to an estate in fee-simple* by the word *forever*, as implied in the observations of Lord Mansfield. Cowper 412. The law contemplates as certain the determination of every estate tail. Fearne 171. And "a life estate to M (wife), remain-

der to M (daughter) and the heirs of her body lawfully begotten, or to be begotten, *as tenants in common*," gives a fee-simple by purchase. So I say of the word *forever*. It is a word technically belonging to the fee-simple; and being the more worthy, in the language of grammarians, must qualify and raise the special meaning of the others to its own dignity.

I must confidently demand that this at least be granted me, that the word *forever* qualifies, so far as to leave in balance the evidence of intention drawn from the mere force of the terms. The question then will be, to which construction shall I incline, where the evidence of intention is in balance. I speak of the evidence which is attempted to be drawn from the use of the terms. Which estate shall be favored, that of the entail, or the fee-simple? If we advert to juridical history, we shall find that the fettering of alienation by the fee conditional at the common law, was not a favorite of the judges, but that they winked at the evasion of it; or in the words of Blackstone, "gave way to a subtle finesse of construction, in order to shorten the duration of these estates." And he goes on to observe that "when the nobility by procuring the statute *de donis*, introduced the fee-tail, the courts, by a kind of *pia fraus*, eluded the statute, by a fiction in barring the entail." And though the maxim of serving the intention in a devise, was extended in the construction of an estate tail, as well as with regard to any other subject of a devise, yet it is impossible not to see, in the juridical history of British decisions, what I may call an emancipation from the shackles of early precedent, in the case of entails; and I cannot but be of opinion, that were the same judges who at early period made some of those decisions, on a bench at this day, they would be shackled still less; in this country, more especially, where a change of property under such decisions, could not affect; and where, in inferring an intention, they would look to the manners, customs, and habits of the people. 2 Massachusetts Reports, 62.

Nor is it only to these that we are to look, but to the *laws* of a community, and the policy of a construction according to the spirit of the statutes on the same subject. Under our colonial government, the policy of the entail became more questionable than it was in the mother country. The right of primogeniture did not exist in the same extent; nor was there the same reason for it, the support of a nobility. If we look to the early laws of distribution in the case of intestacy, we shall dis-

cover the inclination to subdivide estates amongst the individuals of a family, which is totally repugnant to the succession of a single heir. Is it not justifiable in narrowing or enlarging rules of construction, to look at the progress of alterations in the law itself by the legislature of a country? Is it not justifiable to look at even the change in the state of society which may vary the reason of a rule? We brought no church establishment with us from England, to enable us to provide for younger branches; nor was there an equal opportunity of advancement in the army or navy. The locking up estates was unfavorable to the "enlarging the empire, and promoting useful commodities," which is recited in the charter as a consideration of granting it, and to which the subdivision of property was favorable. Shall we not take these things into view in the indulgence we shall give to the construction of terms not technically constituting an estate tail? In the application of a rule of construction, or even in the application of a principle under a different state of things, there is this latitude. *Talis enim est humani juris disciplina, ut opiniones, secundum varietatem temporum, senescant et intermorianitur aliæque diversæ renascantur, et deinde pubescant.* A rule of construction is spoken of as flexible. See Blackstone's argument, *Perrin v. Blake*. Why not yield to a change in the genius and spirit of a system?

But taking it even according to the precedents to which we are referred of British decisions at the earliest period in the construction of terms, there has been none read that comes up to this. Nay, devises, as it would seem to me, more looking like an estate tail, have been adjudged a fee-simple. I refer to the case of *Abraham v. Twigg*, "heir male lawfully engendered," held not an estate tail, because there was not any *body* from whom this male heir should come. This case was that of a deed; but it is added in the report, Cro. Eliz., 478, that "so it is in the case of a devise."

In the devise in question there is not only the want of the word *body*, which must be supplied to make an estate tail, but the word *ever*, which must be rejected to keep clear of the fee-simple. I incline more to reject the word "begotten," and the insensible word "*haire*;" and the devise will then be "to him and his forever," which in a devise is a fee-simple.

The word *haire* is insensible, and I must reject one letter, and transpose another, to make it *heir*. Why this spelling to make out an estate

of questionable policy, and of extreme hardship in an individual case? There can be nothing collected of improvidence in the ancestor, or that in transferring to the defendants, or those under whom they hold, there was not a full and valuable consideration which has substantially come to the use of the family, and of which the plaintiff himself may be presumed to have participated; and the amelioration of the property which may be presumed to have been made by the labor and the money of the defendants, must aggravate the hardship of a recovery against them; more especially as they are without warranty from the ancestor, and even if they were not, the value of the estate more than half a century ago, would go but little way to alleviate the misfortune. It cannot therefore be supposed that under these circumstances I can have any great inclination to collect and infer from technical terms merely, an intention which does not appear by declaration plain, or necessary and unavoidable inference. But the fact is that I could not possibly infer, were I disposed to indulge a construction, that she meant a *taking in succession by the eldest born*. The *tout ensemble* of the whole will together carries with it to me intrinsic evidence of the contrary. I take it to have been drawn by some *clerk's vade mecum* scrivener of the neighborhood, who had seen words in forms, and took them to be necessary in a last will and testament, without distinction of the use. This from my knowledge of the country, and what is usual in such cases. And I take it from the length of time that had elapsed before the idea of an estate tail in this case would seem to have been entertained, that the discovery of it at last was a matter of accident; and that it may well be called a windfall to the plaintiff succeeding in it. The terms of this devise therefore, on the strictest precedents, not imperiously demanding of me the construction contended for, I shall not give it; but hold the estate devised in this case a fee-simple. It becomes therefore unnecessary for me to go into a consideration of the other point that has been made in the argument, the statute of limitation.

Judgment for plaintiff.

“An estate tail may be described to be an estate of inheritance deriving its existence from the statute *de donis conditionalibus*, which is descendible to some particular heirs only of the person to whom it is granted, and not to his heir general,” 1 Cruise 78.

Origin of Estates Tail.

By the ancient common law, all freehold estates of inheritance fell within one of two classes. (1.) Fee-simple absolute; (2.) Limited fees. This second class was subdivided into qualified or base fees and fees conditional. From this latter subdivision estates tail took their rise, as said by Littleton, Sect. 13, 18 b. "Tenant in fee-tail is by force of the statute of W. 2, Cap. 1; for before the said statute all inheritances were fee-simple, for all the gifts which be specified in that statute were fee-simple conditional at the common law, as appeareth by the rehearsal of the same statute."

The fee conditional at common law was where an estate was granted to one and the heirs of his body. The construction given to such a limitation was that it was a grant in fee-simple on condition that the grantee had issue. When the donee had issue, the condition was held performed, and consequently gone, and the estate became a fee-simple, absolutely unfettered for purposes of alienation. Blackstone goes further than this, and says that the estate became, on birth of issue of the donee, "absolute and wholly unconditional." Bl. Com., Book II., p. 111. This, however, is questioned by Chitty in his note to the passage cited, on the authority of Nevil's case, 7 Rep. 33 a, and *Willion v. Berkley*, Plowd. 247, and the law is, by him, asserted to be that though the donee, after having had issue, might freely aliene his land, yet, if he did not, the donor would still be entitled to a right of reverter upon failure of the donee's issue.

Without doubt, in most cases, this interpretation, by promoting the ease with which land could be conveyed, was contrary to the intent and desire of the grantor in creating the conditional estate, and was subversive of the object of the grant, which was to bind tenants to a feudal superior by insuring a continuance of a certain family as the possessor of the grantor's bounty. To correct this, the statute of Westminster 2 (13 Edw. I., c. 1), commonly called *de donis conditionalibus*, was passed. It ordained that "the will of a donor, according to the form of the deed of gift manifestly expressed, be henceforth observed; so that to whom a tenement was given under such condition shall have no power to alien the tenement so given, but that it shall remain unto the issue of them to whom it was given after their death, or shall revert to the donor or his heirs, if issue fail or there is no issue at all." And the second section enacted, "If a fine be levied hereafter upon a tenement so given, it shall be void at law." This second section was repealed by statute 32 Hen. VIII., c. 36, except as to fines levied by a woman after the death of her husband of lands which were by the gift of him or his ancestors assigned to her in tail for her jointure, and as to entails by act of parliament a letter-patent, where the reversion was in the crown.

Recognition of Estates Tail in the United States.

Upon the settlement of this country, the common law as modified by the statute *de donis* became the general law of the land, the statute being recognized, it is believed, in all the original States, except South Carolina, where the fee-simple conditional at common law existed as an estate from early times. *Murrell v. Mathews*, 2 Bay 397; *Wright v. Herron*, 5 Rich. Eq. 441. In 1636, the colony of New Plymouth enacted that all lands theretofore entailed, and that should be entailed thereafter, should descend and enure as by the law of England the same ought to do. In Massachusetts colony the same rule was recognized by the "Fundamentals." In Virginia the force and policy of the statute were so far recognized that in 1710 the legislature passed an act forbidding the levying of a fine or suffering a common recovery of an estate tail, and reserving to the legislature itself the sole power of docking an entail. In Connecticut, in 1789, in the case of *Allin v. Bunce*, 1 Root 96, it was contended that a devise to one and the heirs of his body was of a fee conditional at common law; but the court held it an estate tail. See also *Welles v. Orcott*, Kirby 118; *Chappel v. Brewster*, Id. 175. In Pennsylvania, the statute *de donis* is among those included in the report, made by the judges of the Supreme Court in 1808, of the British statutes in force in that commonwealth. See 3 Binney, Appendix. See also *Jewell v. Warner*, 35 N. H. 176; *Den ex d. James v. Dubois*, 1 Harrison (N. J.) 285; *Giddings v. Smith*, 15 Vt. 344; *Pollock v. Speidel*, 17 Ohio St. 439.

In *Jordan v. Roach*, 32 Miss. 481, the Supreme Court of Mississippi denied that the statute *de donis* was ever in force in that State; and estates tail do not seem ever to have existed in Louisiana.

Species of Estates Tail.

Estates tail may be generally divided into two classes.

I. Estate in tail general, whereof Littleton says: "Tenant in tail general is where lands or tenements are given to a man and his heirs of his body begotten. In this case it is said general tail, because whatsoever woman that such tenant taketh to wife (if he hath many wives and by every of them hath issue), yet every one of these issues by possibility may inherit the tenements by force of the gift; because that every such issue is of his body engendered. In the same manner it is where lands or tenements are given to a woman and to the heirs of her body, albeit that she hath divers husbands; yet the issue which she may have by every husband may inherit as issue in tail by force of this gift, and therefore such gifts are called general tail," Litt., Secs. 14, 15.

II. Estate in tail special, which is thus defined by the same authority. "Tenant in tail special is where lands or tenements are given to a man and to his wife and to the heirs of their two bodies begotten. In this case none shall inherit by force of this gift but those that be engendered between them two. And it is called special tail because, if the wife die and he taketh another wife and have issue, the issue of the second wife shall not inherit by force of this gift, nor also the issue of the second husband, if the first husband die," Litt., Sec. 16. To this Coke adds that if lands be given to a man and woman, not married to each other, and the heirs of their two bodies, yet they have an estate tail in respect of the possibility of marriage, Co. Litt. 20 b.

Estates tail, both special and general, may be limited to heirs male or to heirs female, in which case the heirs of the class named in the deed or devise will inherit, to the exclusion of those of the other class, Litt., Secs. 21, 22.

The estate in frank marriage, which was an estate tail, it is believed has never existed in this country, at least we have discovered no case in which such an estate is mentioned.

What may be Entailed.

As to what may be entailed, Hargraves, Co. Litt. 20 a, note 5, lays down the rule that two things are necessary to an entail under the statute de donis. First, that the subject of the entail be land or some other thing of a real nature; second, that the estate in it be of inheritance. Therefore an incorporeal hereditament may be entailed, but an estate pur autre vie cannot, nor can an estate for years; for it is but a chattel real, no matter how long its duration. Estates pur autre vie and for years may, however, be so settled by way of remainder, executory devise or trust, that many of the purposes of an entail will be answered.

In Pennsylvania, prior to the year 1758, an unlocated land warrant was not a subject of an entail, but after that year such warrants began to be regarded as titles, and the land represented by them became entailable, *Shoemaker v. Huffnagle*, 4 W. & S. 437. A warrant and survey attended by the payment of the purchase-money were regarded as on the same footing as the legal estate in England, and became subject to entail, *Lessee of Burkart, Willis v. Bucher et al*, 2 Binn. 455; *Duer v. Boyd*, 1 S. & R. 203.

Creation of Estate Tail—By Deed.

The technical words for the creation of an estate tail are to A. and the heirs of his body. The word "heirs" is as necessary in the creation of an estate tail as in that of an estate in fee-simple, for the reason given by Coke,

that every estate tail was a fee-simple at the common law, and an estate tail is but a cut or restrained fee; and it is denied by him that "seed," "issue," or "children," can supply the place of "heirs," Co. Litt. 20 a.—The word "heir," in the singular, may, even in a deed, be sufficient to create an estate tail. It is true, Lord Coke, 1 Inst., 8 b, says that a gift to A. and his heir would give but a life estate, but that this is error is clearly pointed out by TILGHMAN, C. J., in *Hall v. Vandegrift*, 3 Binn. §74, in which case his Honor says, "But even in a deed the opinion of Coke is denied by EYRE, C. J., in delivering the opinion of the court in *Dubber v. Trollop*, 8 Vin. 233, pl. 13. His expressions are 'The opinion of Coke is not warranted by anything in Littleton, and is directly contrary to 39 Ass. 20, where lands were given to a man and wife and one heir of their body—which was held to be an estate tail.'" See also *Manwaring v. Tabor*, 1 Root 79, where a deed to A. and the heir male of his body was held to give an estate tail.

The words of inheritance may be supplied by a reference to another limitation, provided such limitation is clearly of an estate tail, Co. Litt. 20 b, as a gift to A., and the heirs of his body, remainder to B., in manner aforesaid.

The words of procreation "of the body" may be supplied by equivalent expressions. Co. Litt. 20 b, 2 Bac. Abr. 543.

Where an estate tail is given, the fact that the habendum of the deed creating it, is to the grantee and his heirs, will not enlarge the estate to a fee-simple, *Corbin v. Healy*, 20 Pick. 514; nor will the entail be destroyed by a warranty to the grantee "and his heirs as aforesaid." Id.

Where a deed is to one, the heirs of his body and assigns, the addition "assigns" will not enlarge the estate granted to a fee, *Pollock v. Speidel*, 17 Ohio St. 439.

The rule in *Shelly's* case applies in cases of estates tail, as will appear in the note upon that subject.

By Devise. Regard to Intention of Testator.

The proper technical words for the creation of an estate tail are the same in a devise as in a deed, but from the regard paid by the law to the intent of the testator, the technical expressions are not essential, and any expressions in a will which show that the intent of the testator was to give an estate to a person, and that the said estate should be inherited by his issue will be construed as giving an estate tail. Thus in *Clark v. Baker*, 3 S. & R. 470, the testator devised land to his daughter M., and his granddaughter E., to hold to them and to their lawful issue forever, share and share alike in two equal shares, with the further direction that if either M. or E. died

without leaving lawful issue of their bodies, then the land should go to the survivor and her lawful issue forever, and if both died without issue then over in fee. This devise was held to give an estate tail to the daughter and the granddaughter. *TILGHMAN*, C. J., in the course of the opinion of the court, saying, "Here is a plain intent to provide for each devisee and her issue forever; that is to say, as long as issue should remain, which might possibly be forever. The intent is equally plain, too, that the issue of each should take *through* the ancestor by *descent*, and not *with* the ancestor by *purchase*, because the land is to be divided into but two parts; whereas, if even all the children of the daughter and granddaughter were to take as purchasers with their parents, it might be necessary to divide it into many parts; and also because there is no mode but by descent in which the estate can be secured to the issue indefinitely. Now the intention of giving to the parents first and then to the issue so long as issue should remain, is an intent to give an estate tail." And see *Stone v. McMullen*, 10 W. N. C. 541.

Expressions held Equivalent to "Heirs of the Body."

The word "issue," in a will, has *prima facie* the force of heirs of the body, *Taylor v. Taylor*, 63 Pa. St. 481; *Johnson v. Johnson*, 2 Met. (Ky.) 331; and the expression "legal heirs" may be construed with like effect, *Braden v. Cannon*, 1 Grant 60; *Same v. Same*, 24 Pa. 168.

A devise to one and "his heirs lawfully begotten," followed by a remainder in case the devisee die without heirs, will give the devisee an estate tail, *Pratt v. Flamer*, 5 H. & J. 10; so also will a devise which directs the land to descend to the "lawful heirs from generation to generation," *Gause v. Wiley*, 4 S. & R. 509; or a devise of land to descend to the "legal offspring" forever, *Allen v. Markle*, 36 Pa. St. 117; or a devise to A. and "his male heirs," *Den ex d. Crane v. Fogg*, Penn. (N. J.) 819; or when the devise is to one "and his children," and the devisee has no children at the time of the making of the will, *Nightingale v. Burrell*, 15 Pick. 104; *Clark v. Baker*, *supra*; and this is also the case where the testator has used the word "heirs," and it appears that he has used it to mean children, *Seibert v. Wise*, 70 Pa. St. 147; *Parkman v. Bowdoin*, 1 Sumn. 359; *Brown v. Weaver*, 28 Ga. 377; or where the devise is to one "and his grandchildren" under like circumstances, *Wheatland v. Dodge*, 10 Met. 502.

Where the word "heirs" is used, and the will explains that thereby issue is meant, an estate tail will be given, *Den d. Holcomb v. Lake*, 4 Zab. 686.

A devise to one and his heir, with words showing that the word "heir" is used in the sense of issue as "male heir," or as a *nomen collectivum*, will give the devisee an estate tail, *Hall v. Vandegrift*, 3 Binn. 374; *Den d.*

Ewan v. Cox, 4 Hals. 10; *Brownell v. Brownell*, 10 R. I. 509; *Cuffee v. Milk*, 10 Metc., 366.

Effect of Remainder in Fee or Tail after an Indefinite Failure of Issue.

A devise in fee followed by a remainder in fee or in tail after an indefinite failure of issue is construed an estate tail by implication, *Amelong v. Dorney*, 16 S. & R. 325; *Heffner v. Knepper*, 6 Watts 18; *Amelia Smith's Appeal*, 23 Pa. St. 9; *Pierce v. Hakes*, Id. 231; *Vaughan v. Dickes*, 20 Id. 509; *Hansell v. Hubbell*, 24 Id. 244; *Wall v. Maguire*, Id. 249; *Eichelberger v. Barnitz*, 9 Watts 447; *Wynn v. Story*, 38 Pa. St. 166; *Curtis v. Longstreth*, 44 Id. 297; *Matlack v. Roberts*, 54 Id. 148; *Gast v. Baer*, 62 Id. 35; *Ogden's Appeal*, 70 Id. 501; *Irwin v. Dunwoody*, 17 S. & R. 61; *Williamson v. Daniel*, 12 Wheat 568; *Laidler v. Young's Lessee*, 2 H. & J. 69; *Shoofstall v. Powell*, 1 Grant 19; *Braden v. Cannon*, Id. 60; *Hill v. Burrow*, 3 Call 342; *Criley v. Chamberlain*, 30 Pa. St. 161; *Morehouse v. Cotheal*, 1 Zab. 480; *Sydnor v. Sydnors*, 2 Munf. 263; *Hulburt v. Emerson*, 16 Mass. 241; *Dart v. Dart*, 7 Conn. 250. A provision for a reversion on an indefinite failure of issue will have the same effect as a remainder in fee or tail limited thereon, *Hayward v. Howe*, 12 Gray 49. By the expressions, "die without issue," or "die without leaving issue," or "having no issue," and kindred expressions, unless there are some qualifying words showing a contrary intent, a testator will always be held to have meant an indefinite failure of issue. As said by WESTON, C. J., in *Riggs v. Sally*, 15 Me. 408: "The general doctrine of the books, from an early period of the English law, is that a limitation over, if the first devisee dies without issue of his body, is to be understood to mean an indefinite failure of issue. . . . And this is to be the construction, unless it clearly and distinctively appears by the will that the failure of issue upon which the devise over depends, has reference to the time of the death of the first devisee." See also *Newton v. Griffith*, 1 H. & G. 111; *Executors of Condict v. King*, 2 Beas. 375 (in New Jersey, however, the rule of interpretation has been changed by statute); *Hall v. Priest*, 6 Gray 18; *Waples v. Harman*, 1 Harring 223; *Nightingale v. Burrell*, 15 Pick. 104; *Parker v. Parker*, 5 Met. (Mass.) 134; *Weld v. Williams*, 13 Id. 486; *Abbott v. Essex Co.*, 2 Curt. C. C. 126, 18 How. 202; *Brightman v. Brightman*, 100 Mass. 238; *Allen v. Trustees of Ashley School Fund*, 102 Id. 265; *Stone v. McMullen*, 10 W. N. C. 541. The nature of the estate limited in remainder is a very important element in determining whether a definite or indefinite failure of issue is intended, since a devise over for life necessarily implies that that devisee in remainder may outlive the first estate, *Taylor v. Taylor*,

63 Pa. St. 485; *Hope v. Rusha*, 88 Id. 127; but while it is an important element, it is not of controlling force, and the limitation of a life estate in remainder does not of itself convert what would otherwise be construed an indefinite into a definite failure of issue, *Watkins v. Sears*, 3 Gill 492.

The addition of "unmarried" to dying without issue, "dying without issue and unmarried," will not turn an indefinite into a definite failure of issue, *Vaughan v. Dickes*, 20 Pa. St. 509; *Matlack v. Roberts*, 54 Id. 148.

In general, it may be said that whenever it is apparent that the testator's intent is that the issue shall take by inheritance from the first taker, and an estate in fee or tail is given in remainder on an indefinite failure of issue, then the devise will be construed as giving an estate tail, *Pott's Appeal*, 30 Pa. St. 168; in Kentucky, however, a devise to one in fee followed by a devise over in case the first taker shall die without lawful issue is held to give a defeasible fee and not an estate tail, *Sale v. Crutchfield*, 8 Bush 637; see also *Hart v. Thompson*, 3 B. Mon. 482; *Daniel v. Thomson*, 14 Id. 662. A devise not expressly in fee, followed by a limitation in remainder in fee or tail, will give an estate tail to the first devisee. Thus, a devise to A., "and if he die without lawful heirs of his body," or "without lawful heirs," then over, will give an estate tail, *Tate v. Tally*, 3 Call 354; *Doe d. See v. Oraigen*, 8 Leigh 449; *Den d. Sanders v. Hyatt*, 1 Hawks 247; *Covert v. Robinson*, 46 Pa. St. 274; or, "if he die without heir or issue," then over, *Lessee of Willis v. Bucher*, 3 Wash. C. C. 369; *Albee v. Carpenter*, 12 Cush. 382.

A devise for life with a remainder in fee to the heirs of the life tenant, which by the rule in *Shelly's* case would constitute a fee in the first taker, followed by a devise in fee in case of the death without issue of the first taker, or in case of the issue dying under the age of twenty-one years, will give the first devisee an estate tail, *James's Claim*, 1 Dall. 47; *Doe d. Evans v. Davis*, 1 Yeates 332.

A devise to E. W. and his heirs forever, and if E. W. should "die without lawful issue of a son" then over, has been held by the Supreme Court of Virginia, *TUCKER, P.*, dissenting, to give an estate tail, *Wright v. Cohoon*, 12 Leigh 370.

An express devise for life, with the provision that if the devisee should die without lawful issue of her body, her "share" should be divided amongst the other children of the testator, has been held to give an estate tail, *Mast and Morris's Appeal*, 2 W. N. C. 404; so also a devise to B. for life, and should he die without issue, then over, "but should he leave issue, my will is that he may dispose of said land to such of his issue as he may think fit," *Callis v. Kemp*, 11 Grat. 78; *Ball v. Payne*, 6 Rand. 73.

A devise to S. S., by her freely to be enjoyed and possessed, but if she

die without children and heirs of the body, then over creates an estate tail, *Shoemaker v. Huffnagle*, 4 W. & S. 437.

A devise to J. S. "and his heirs by his present wife" will give an estate tail, *Somers v. Pierson*, 1 Harrison (N. J.) 181.

An estate tail will be given by a devise to one "and his lawfully begotten heir or heirs forever," without words of procreation, *Den d. Evans v. Cox*, 4 Hals. 10.

A devise to several persons "and the heirs of their bodies" is construed as giving an estate tail in common, *Perry v. Kline*, 12 Cush. 118; so also a devise to several of a class "and the heirs of their bodies begotten," *Johnson v. Johnson*, 2 Met. (Ky.) 334; *Brown v. Alden*, 14 B. Mon. 144; *True v. Nicholls*, 2 Duval 547; *Lachland v. Downing*, 11 B. Mon. 33; *Prescott v. Prescott*, 10 Id. 58.

Devise apparently in Fee-Simple Reduced to a Devise in Tail by the Context of Will.

In some cases, where the testator in defining the estate devised has used the words "in fee-simple," they have been made to give way to the context of the will, and an estate in fee-tail has been held to have been given. In *Parkman v. Bowdoin*, 1 Sumn. 359, the devise was to A. for life, and after her death to her second son B., and to his lawfully begotten children in fee-simple forever, but in case he should die without children lawfully begotten, then over. STOKY, J., said, "'In fee-simple' means the same as to their heirs and assigns, and the devise over being to collateral heirs, these words are necessarily cut down to heirs of the body, if the devise over is to take effect only upon an indefinite failure of issue," and in *Price v. Taylor*, 28 Pa. St. 95, where the devise was to T. for life "provided she shall not leave issue at her death, but if she shall leave issue then to her heirs in fee-simple forever," which, of course, gave T. an estate of inheritance under the rule in Shelly's case, the devise was held to be of an estate tail, LOWRIE, J., remarking, "The limitation to the issue in fee-simple goes for nothing, as being inconsistent with the lineal descent with which the estate starts."

A devise to several sons of the testator and their heirs forever, with a provision that if any die without heirs of their body, or issue, their parts shall be divided among the surviving brothers, is held to give an estate tail, *Sydnor v. Sydnors*, 2 Munf. 263; *Bells v. Gillespie*, 5 Rand. 273.

Express or Implied Devise in Tail not Enlarged by Implication.

An express devise in tail will not be enlarged to a fee-simple by being made subject to a charge, *Den ex d. Wilson v. Small*, Spen. (N. J.) 151;

Dewitt v. Eldred, 4 W. & S. 414; nor where a devise in fee has been reduced to a tail by implication will a charge of legacies increase it to a fee, *Heffner v. Knepper*, 6 Watts 18.

The addition of the words "and assigns" to the usual words of procreation will not enlarge an estate tail to a fee, *Doe d. Doremus v. Zabriskie*, 15 N. J. Law 404; *Lessee of Wright v. Scott*, 4 Wash. C. C. 16. In the latter of these two cases, the devise was to A. and B. "and their heirs begotten of their bodies and assigns forever, or for want of such heirs and assigns" then over; and the court was influenced to a certain extent by the fact that if the first given estate were enlarged to a fee, the will would then contain a limitation of a fee upon a fee.

It has been contended that the use of the word "forever" after heirs of the body will enlarge a fee-tail to a fee-simple, but the law is otherwise, *Grout v. Townsend*, 2 Denio 336; *Hall v. Vandegrift*, 3 Binney 374; *Den d. Ewan v. Cox*, 4 Hals. 10; *Lessee of Wright v. Scott*, *supra*.

A devise in tail by apt words will not be enlarged to a fee by a general devise in the same will to the same person of all of the testator's property "except what is before excepted." The exception will cover the former devise as well as what has been devised to other persons, *Browne's Lessee v. Anderson*, 2 H. & McH. 100.

In the case of *Wight v. Thayer*, 1 Gray 284, the devise was to E. "and the heirs of his body lawfully begotten, and to their heirs and assigns forever." It was argued by counsel that though this devise created an estate tail in E., yet after her death it became enlarged to a fee-simple, so as to go to the general heirs of the heir in tail; but this position was denied by the court. SHAW, C. J., in the course of his opinion said, "But this would be alike inconsistent with principle and authority. An estate tail, though created and brought into existence by deed or will, is still an estate of inheritance, and when once vested and until barred, passes, like other estates of inheritance, by operation of law; and though it is competent for a deviser to create as many particular estates as he will to hold in succession, yet it is not competent for him to alter the rules of law which govern the descent of an estate, either in fee or in tail, which has once vested. Were such an intention manifested, it could not be carried into effect, because contrary to the rules of law. If it was an estate tail in Benjamin Hall, then it must continue an estate tail until barred by common recovery or otherwise, or until failure of heirs in tail. So long as there are heirs in tail capable of taking by the form of the gift, there can be no limitation over to heirs general. The very nature of an estate tail is that it is an estate exclusively limited to a particular class of heirs; the legal construction put on it is that it divides the inheritance or general estate in fee,

making a particular estate to the donee in tail and the special heirs, and leaving the estate in the donor, which he may limit over by way of remainder, and which without such limitation will revert to the donor or his general heirs.* 2 Inst. 335.

“It has been said upon the authority of Lord COKE (Co. Litt. 21 a), cited by the petitioner’s counsel, that when a person in the premises of a deed gives land to another, and the heirs of his body, habendum, to him and his heirs forever, he will take an estate tail with a fee-simple expectant. In tracing this proposition, it will be found to be this: When it is manifest, by the premises, that the donor intends to give an estate tail, and from the subsequent part of the deed it is equally manifest that he intends to give ultimately an estate in fee, it will operate as a grant of a present estate tail with a fee-simple expectant. But expectant upon what event or contingency? Clearly upon the determination of the particular estate, the estate tail, by the failure of heirs in tail, which is its own proper limitation. It operates by way of gift of the particular estate in tail with a limitation over, by way of remainder, to the general heirs of the same donee in fee. Of course, such remainder over in fee cannot take effect until the failure of the issue in tail.” See also *Buxton v. Uzbridge*, 10 Metc. 87.

An estate to A. in tail will not be reduced by a provision in the devise that if the first taker “should decease not having lawful heirs,” the estate should go over in fee or tail, *Tidball v. Lupton*, 1 Rand. 194. A gift to two and the heirs of their bodies will not be cut down to a life estate in the first takers by a restriction on the power of alienation, and a provision for survivorship between them, followed by devise over in fee in case both should die without issue. As said by STRONG, J., *Linn v. Alexander*, 59 Pa. St. 43: “An estate tail may be followed by a limitation on a definite failure of issue. So, like an estate in fee, it may depend for its continuance on the performance of a condition, or may be defeated by the happening of a contingency, but when once created it remains an estate tail until the occurrence of the contingency, or until the condition is broken upon which its continuance was made to depend.”

Incidents.

A tenant in tail has power to commit waste, *Liford’s Case*, 11 Co. 50 a; *Holes v. Petit*, Plow. 259; *Secheverel v. Dale*, Poph. 194; *Att’y-Gen. v. Duke of Marlborough*, 3 Madd. 531.

An estate tail is subject to dower, *Amelia Smith’s Appeal*, 23 Pa. St. 9; *Kennedy v. Kennedy*, 5 Dutch. 188; and curtesy. See *Voller v. Carter*, 4 El. & Bl. 173.

It is not subject to merger, *Wiscot's Case*, 2 Co. 61 a; *Carell v. Cuddington*, Plow. 296.

It is forfeitable for treason, but for no longer period than the life of the person attainted of treason, and this, it seems, independently of the provision in the Constitution of the United States, *Roe d. Evans v. Davis*, 1 Yeates 332; *Den d. Hinchman v. Clark*, Coxe (N. J.) 340.

Tenant in tail cannot be compelled to keep down the interest of incumbrances, for the estate is *his*; it is only on his power of alienation that there is a restriction, *Amesbury v. Brown*, 1 Ves. Jr. 477; *Chaplin v. Chaplin*, 3 P. Wm. 235; but the guardians of an infant tenant in tail are bound to do so, so far as the rents and profits of the estate go, *Sergison v. Sealey*, 2 Atk. 416; *Burgess v. Mawby*, 1 T. & R. 176.

A tenant in tail has power to bar the entail either, as formerly, by means of a fine or common recovery, or by any of the statutory methods now in force, and the right to bar an entail is so essential a part of an estate tail, that the law will not permit the tenant to divest himself of that power, *Doyle v. Mullady*, 33 Pa. St. 264; nor can a testator in giving an estate tail effectually prohibit the donee barring it, *Dewitt v. Eldred*, 4 W. & S. 414; and even when the tenant is out of possession through a sale of his estate, either by himself or through judicial process, he still retains sufficient interest therein to enable him to bar the entail, *Elliott v. Pearsall*, 8 W. & S. 38; *Sharp v. Petit*, 4 Yeates 413; *Hall v. Thayer*, 5 Gray 523; *Watts v. Cole*, 2 Leigh 653; *Waters v. Margerum*, 60 Pa. St. 39.

The tenant in tail cannot alien the land for a longer time than his own life, and his alienee takes an estate pur autre vie, or, rather, a base fee, voidable by the entry of the issue in tail, *Watts v. Cole*, *Waters v. Margerum*, *supra*, Litt., § 613. This is also the case where the land is sold for the debts of the tenant in tail, except where it is otherwise provided by statute, as in Massachusetts (Stat. 1791, c. 60, § 2, p. 412,) and Pennsylvania (Act April 15, 1859, § 1, P. L. 670).

It would seem that such a statute would not apply to an estate tail in remainder, and it has been so held in Massachusetts, *Holland v. Cruft*, 3 Gray 162.

A statute is necessary to enable the tenant in tail to mortgage the entailed land, *Todd v. Pratt*, 1 H. & J. 465.

The heir in tail is not bound by a conveyance and release of his ancestor. In *Buxton v. Uxbridge*, 10 Metc. 87, the testator devised to B. an undivided half of a piece of ground in fee, and to C. the other half of the same in tail. B. and C. made partition with mutual releases. The court held that each, thereby, became seized of one-half of his estate in fee and the other half in tail, and C. having aliened his portion, his heirs could recover

one-half thereof from the alienee; nor is the heir bound to carry out a contract of his ancestor for the conveyance of the entailed estate, since he claims *per formam doni*, and not through the bounty of his ancestor, *Partridge v. Dorsey's Lessee*, 3 H. & J. 302; *Jones v. Jones*, 2 Id. 281; and a formal entry by the issue in tail is not necessary to avoid the conveyance of the ancestor, *Den v. Robinson*, 2 South. 689.

Descent.

At common law the descent of an estate tail resembles that of a fee-simple, except that the descent must, however, always be traced from the donee in tail. Thus by the common law, lands given to A. in tail would descend upon his death to his eldest son, and on his death without issue to the other sons of A. successively in like manner, according to priority of birth. After the lines of all the sons were exhausted, the land would go to the donee's daughter, if there should be but one, but if there should be more than one, then all the daughters would take jointly. With regard to the more remote lineal descendants of the donee in tail, the descent of an estate tail is the same as that of one in fee. Upon a failure of lineal heirs the estate will either go to those entitled in remainder, or will revert to the donor or his heirs. In an estate in tail male, the issue male will alone inherit, and the same may be said, *mutatis mutandis*, with reference to estate in tail female, Litt., Secs. 21, 22, 23.

The common law rule of descent of estates tail obtained at an early day in the United States, *Reinhart v. Lantz*, 37 Pa. St. 491; *Sauder v. Morningstar*, 1 Yeates 313; *Corbin v. Healy*, 20 Pick. 514. The rule has been changed by statute in many of the States, as will appear in the portion of this note which refers to the statutory regulation of estates tail; but in the absence of an express statutory change of the course of descent, it may be said that the rule of descent remains as at common law, and that unless expressly included an estate tail will not be embraced within provisions of an intestate act. In *Riggs v. Sally*, 15 Me. 408, the court said: "The statute law of inheritance, as far as respects intestate's estates, differs from the common law; but it does not affect estates tail which depend on the will of the donor."

Methods of Barring Entail. Fine.

The ancient methods of barring an entail were by levying a fine or suffering a common recovery.

Of the former we find no examples in our reports, and the court in

Moreau v. Detchemend, 18 Mo. 527, denied that it had ever existed in this country. This assertion is, however, erroneous, since we find it recognized in several statutes, *e. g.* that of Pennsylvania, of Jan. 27, 1749–50, § 1, and we find that it continued in New York until 1830, when it was abolished, *McGregor v. Comstock*, 17 N. Y. 163. It was abolished in New Jersey in 1799, and continued in Pennsylvania until 1837. See Kent Com., Vol. IV., p. 497; Washburn, R. P., Vol. I., p. 97. The fine was a fictitious action. The person to whom the land was to be conveyed brought an action against the tenant in tail for a breach of an agreement to convey the land, whereupon the defendant applied to the court for leave to compromise the action, which being granted the defendant acknowledged the title to the land to lie in the demandant, which acknowledgment was made in open court or before a judge or a commissioner, and entered of record, and duly enrolled. The fine barred only the issue of the person levying the fine, and therefore created a base fee determinable upon the failure of the issue of the person levying, *Seymour's Case*, 10 Co. 95 b.

Common Recovery.

The latter method was early known and practised, it is believed, in nearly all the States in which estates tail existed; it was at an early date prohibited in Virginia, and is said, *Pollock v. Speidel*, 17 Ohio St. 439, never to have been known in Ohio, into which portion of the older commonwealth civilization had not advanced at the time of the abolition of the common recovery. In Pennsylvania, before 1750, there were on record only some three instances of a common recovery, owing possibly to a doubt as to their validity; in 1750, however, the doubt was settled by an act of a declaratory character, which established common recoveries on a firm basis as a common assurance. See *Carter v. McMichael*, 10 S. & R. 429; *Sharp v. Petit*, 4 Yeates 413; *Wood v. Bayard*, 63 Pa. St. 320; *Stump v. Findlay*, 2 Rawle 168.

The common recovery was at first a collusive action, and it always retained the form of an action even after it was recognized as a common assurance. The tenant in tail procured some one to bring an action against him, claiming to recover therein the entailed land, whereupon the tenant "vouched," or called upon a third person, who, he alleged, had warranted the title, to defend it. The vouchee appeared and admitted the warranty, and then made default, whereupon the judgment of the court was that the demandant recover the land claimed and the defendant recover over, from the vouchee, lands of equal value. This was the recovery by single voucher, and it barred the estate of which the tenant in tail was actually seized at the time of suffer-

ing it, but did not bar remainders and reversions. And, therefore, to completely unfetter the estate, there was invented the recovery with double voucher. In this the tenant in tail conveys the land in fee to an indifferent person, known as the tenant to the præcipe, against whom the action is brought; whereupon the tenant to the præcipe vouches the tenant in tail, who vouches over the common vouchee, and a default being made, the judgment is that the demandant recover from the tenant to the præcipe, that he recover from the tenant in tail lands of equal value, and that tenant in tail recover over from the common vouchee.

It was questioned whether where a tenant in tail was out of possession, his estate having been taken in execution and sold by the sheriff, the sheriff's vendee could suffer a common recovery, and by vouching the tenant in tail cut off the entail. It was held that he could, and that the sheriff's vendee would be a good tenant to the præcipe, *Sharp v. Petit*, 4 Yeates 413. A tenant to the præcipe must by right or wrong have an estate of freehold, an equitable interest will not suffice, *Stump v. Findlay*, 2 Rawle 168. A tenant for life with a vested remainder in tail general, after an intermediate estate for life and various contingent estates tail, can make a good tenant to the præcipe, *Lyle v. Richards*, 9 S. & R. 322. A common recovery suffered by a tenant in tail after he has conveyed the land will enure to the benefit of the alienee, *Den v. Robinson*, 2 South. 689. A common recovery will cause judgments previously obtained against the tenant in tail to become liens upon the fee. See *Maslin v. Thomas*, 8 Gill 18; 5 Cruise 493, c. 9.

A common recovery, once suffered, cannot be avoided for any error or defect therein, unless a writ of error is brought or an appeal is taken within the proper time; it cannot be attacked collaterally, but, like a judgment, can only be impeached for fraud or because the defendant was not tenant of the freehold, *Ransley v. Stott*, 26 Pa. 126; *Wood v. Bayard*, 63 Pa. 320.

Barring by Recovery against the Estate of the Creator of the Entail.

It being more in accord with the policy of most of the States that land should be capable of easy transfer than that it should be tied up and fettered, less cumbersome modes of barring entails were soon sought for, and a method resembling the common recovery, in that it was in form an action at law, was soon formed to apply in cases in which the entail sought to be barred, had been created by will. In this country lands generally from the earliest times were assets for the payment of debts, and therefore, where the lands of a decedent, who by his will had created an estate in them, were

sold for the payment of his debts, the purchaser would take an estate in fee-simple, since he would take an estate which was prior to the creation of the estate tail, and this was held also to be the case where an estate tail was devised, charged into the testator's debts, and the land was afterwards sold therefor, *Gause v. Wiley*, 4 S. & R. 509; accordingly, especially in Pennsylvania, the practice sprang up of barring an estate tail by bringing an action founded on some real or supposed debt of the testator, and selling the land by virtue of a judgment and execution thereon. See the remarks of Chief-Justice TILGHMAN in *Lyle v. Richards*, 9 S. & R. 322; *Nokes v. Smith*, 1 Yeates 244; and Mr. W. H. Rawle's lecture before the Law Department of the University of Pennsylvania, at the opening of the session 1881-2, 38 Leg. Int. 380.

Writ of ad quod damnum.

Another early discovered method was by the writ of *ad quod damnum*. This method was in use in Virginia. The policy of Virginia differed from that of the other States, and though she was, under the lead of Jefferson, the first State to actually abolish estates tail, yet, prior to so doing, she treated them with great consideration, and did much to foster and preserve them. In 1710, an act was passed prohibiting the use of fines and common recoveries to bar entails, and reserving to the legislature the exclusive right to dock them. This policy was found to work injuriously in the case of small estates, and accordingly in 1734 the writ in question was invented. By this proceeding a writ issued to inquire whether the land, the entail of which it was proposed to bar, were under £200 in value, and whether it did not adjoin other lands of the tenant in tail. If the jury found the value under £200, and that the land did not adjoin other land of the tenant in tail, an order was made, by virtue of which a particular species of conveyance was declared to vest the land in fee-simple, and by the writ the issue in tail and the remainder-men were barred. See *Carter v. Tyler*, 1 Call 165. This writ had to be sued out by a tenant in tail in possession, and hence, where he had made a deed to any one else, he could not bar the entail, *Gleeson's Heir v. Scott*, 3 H. & Munf. 278.

No Discontinuance caused by a Deed of Bargain and Sale, or by a Covenant of the Tenant in Tail.

A deed of bargain and sale by the tenant in tail without assets descending does not bind the issue in tail, *Den v. Robinson*, 2 South. 689. In *Wells v. Newbold*, 1 Taylor 166, a bargain and sale by the tenant in tail was held

to work a discontinuance and to bar the entry of the issue; but this was denied, and the case overruled in *Gilliam v. Jacocks*, 4 Hawks 310, in the course of the opinion on which case HENDERSON, J., said: "A bargain and sale is a rightful conveyance; the statute transfers the seizin of the bargainor to the bargainee; such a seizin, such an estate as the bargainor had is transferred to the bargainee. I speak not as to parties, but as to strangers, that is, those not claiming under either of them. . . If tenant in tail, therefore, bargain and sell the entailed land in fee, it is not a discontinuance of the estate tail, for that is a separation of the right from the estate; for the issue in tail claims not from the tenant in tail, but *per formam doni*; he is therefore a stranger to the bargainor, and as to him the bargain and sale passes only an estate for the life of the bargainor; his estate remaining still in him, he is not put to his action to *recover* it, for he has not lost it; he may enter, which is the touchstone by which is ascertained whether an estate is lost or not, for if the tenant is disseized, and has not by a descent or otherwise lost his right of entry, he may compel the lord to avow upon him and in all respects recognize him as one having the estate, . . . and his right of entry will support a contingent remainder dependent on his estate as the precedent freehold, and as the issue in tail after the death of the bargainor may enter (which is not disputed by any one), it proves beyond a doubt that the estate tail is in him and not in the bargainee, that is, the bargainee has no estate of any kind; for there cannot be two persons in the same estate at the same time holding adversely. . . There is thus no separation of the right from the estate, they are both united in the issue, there is no discontinuance. . . I will next endeavor to show that it derives no aid from the warranty on discontinuing the estate; a warranty is a covenant annexed to an estate. Without an estate there cannot be a warranty. When no estate passes by a deed and the grantee had no estate before, the warranty is a nullity. If an estate is made to a man for life, with warranty to him and his heirs forever, the warranty determines with the life estate, it entwines itself around it and must fall to the ground with it. . . It may be now safely asked, Does the discontinuance arise from the warranty, or the bargain and sale, or both combined? It does not arise from either separately, and there is no estate in the bargainee after the bargainor's death, with which the warranty can combine or unite. In truth, it cannot be a discontinuance unless we entirely change the nature of the thing." See also *Mayson's Lessee v. Sexton*, 1 Har. & McH. 275; *Ridgely v. McLaughlin*, 3 Id. 220.

In *Den d. Jacocks v. Gilliam*, 3 Murph. 47, the tenant in tail aliened with a covenant for himself and his heirs to warrant and defend and secure the possession of the alienee against all lawful claims. It was held that no discontinuance was worked, and that the warranty was a mere personal cove-

nant, which did not bind the heirs, although assets descended, and that the alienee, or his heirs, on being ousted would be obliged to look to the administration of the grantor's estate for compensation.

A covenant to stand seized to the use of the covenantee does not work a discontinuance, although the deed be in form one usually accompanying livery of seizin, no such livery in fact being made, *Watts v. Cole*, 2 Leigh 653.

The issue in tail cannot before the death of the tenant in tail discontinue by a deed of bargain and sale with a warranty, *Hopkins v. Threlkeld*, 3 H. & McH. 443.

Statutory Bar by Deed.

In most of the United States statutory provisions have been made, whereby estates tail may be barred by a deed executed with greater or less formality.

In Maryland, by statute of 1782, ch. 23, a tenant in tail was given power to convert his estate into a fee by conveying to another and taking back a conveyance in fee-simple, and made it a simple conveyance by bargain and sale vested a fee in the grantee, *Laidler v. Young's Lessee*, 2 H. & J. 69. A devise in fee would not, however, destroy the entail, nor a mortgage, for on the payment of the debt the former estate would revive. *Id.*

In Massachusetts, by statute of 1791, c. 61, § 1, p. 413, it was made lawful for any tenant in tail "being of full age, by deed, subscribed before two or more credible witnesses, and acknowledged and recorded, for a good or valuable consideration, *bona fide* to grant such lands (*i. e.* held in tail) in fee-simple . . . and such deed . . . shall be sufficient and effectual in law to bar all tails . . . and to vest the absolute inheritance in fee-simple in such purchaser or grantee without any force or common recovery."

Under this act it has been held that the deed to bar the entail must actually be made for a good or valuable consideration, and it is not sufficient if it purport to be made for such consideration, and therefore that when the tenant in tail without such consideration conveyed his land in fee, by a deed which expressed a valid consideration in order that the land might be reconveyed to him in fee, the entail was not barred, *Soule v. Soule*, 5 Mass. 61. The "good" consideration of the act includes love and affection, *Wheelwright v. Wheelwright*, 2 Mass. 447. In *Whittaker v. Whittaker*, 99 Mass. 366, a devisee in tail in remainder conveyed, by an antenuptial settlement, during the life of the life-tenant, her estate to a trustee in trust for herself, reserving a power of appointment by deed; after the death of the life-tenant, she made an appointment without the assent of her husband, and later, jointly with him and the trustee, conveyed to a new trustee without words of covenant or grant. It was held that the entail was not barred, for the

first deed showed no intent to bar the entail, and there was no possession on the part of the grantor, and the second deed rose no higher than that of which it was a mere execution, while the third merely changed the trustee. Under this statute a deed by husband and wife of the entailed estate of the wife will bar the entail, *Nightingale v. Burrell*, 15 Pick. 104.

By the second section of the act of 1791, which subjects the estate of a tenant in tail to his debts, the tail may be barred by being taken in execution and held during the life of the tenant or by a sale, for his debts, made by license of court after his death. This applies to estates tail in possession only, and does not extend to estates tail in remainder, *Allen v. Trustees of Ashley School Fund*, 102 Mass. 265. When the tenant in tail is *non compos mentis*, a sale for his debts by his guardian, a license of court having been obtained, is within the said section, *Williams v. Hichborn*, 4 Mass. 189.

In Maine, the Massachusetts statute was re-enacted by statute of 1821, c. 36, § 4, and has been declared to have not only a prospective but retro-active force, to act on estates tail already in being, as well as on those created after the passage of the act, *Riggs v. Sally*, 15 Me. 408. See also *Willey v. Haley*, 60 Me. 176.

In Pennsylvania, at an early period in the colonial history, repeated acts were passed for the purpose of docking or barring estates tail by deed; but these acts were regularly repealed by the Queen in Council. After the revolution, in 1799, was passed the act at present in force, which provides "that any tenant in tail in possession, reversion, or remainder, may convey his land as in fee-simple, provided the deed state the intention of the grantor to bar the entail, and that it be first acknowledged in open court and be recorded." If the deed be not recorded, it loses its effect as a bar to the entail, *Theological Seminary v. Wall*, 44 Pa. St. 353; *George v. Morgan*, 16 Id. 95, but it will be efficient to pass the estate of this tenant in tail during his life to the vendee, *George v. Morgan*, Id. The terms of the act do not cover a devise. In *Theological Seminary v. Wall*, *supra*, it was argued that a devise to a charity barred an entail, but, as said by THOMPSON, J., "It is contrary to all received notions of charity, that a man may devise what is not his own, provided it be to a charity."

In Rhode Island, a tenant in tail may bar the entail by deed or devise; the deed must be acknowledged before the Supreme Court or the Court of Common Pleas, Gen. Stat. 1872, ch. 161, § 3, p. 348. See *Manchester v. Durfee*, 5 R. I. 549.

In Delaware, a tenant in tail has power to bar the entail by a deed, Laws, 1874, p. 507.

In many States, the radical nature of the statutes with regard to entails has rendered unnecessary any specific provision for barring them.

While deeds barring estates tail take the place, for all practical purposes, of the old common recovery, they still have not all the properties thereof. For example, they have not the same immunity from attack except in specified ways, thus, while a common recovery cannot be set aside on account of the infancy or insanity of the person suffering it, a deed barring an entail may be avoided by proof of the infancy or insanity of the grantor, *Wood v. Bayard*, 63 Pa. St. 320; nor will the execution of a deed barring an entail let in the claim of a prior judgment against the land, *Mastin v. Thomas*, 8 Gill 18.

A deed barring an entail destroys the remainders depending upon it, *Greenawalt v. Greenawalt*, 71 Pa. St. 483.

Statutory Abolition and Curtailment of Estates Tail.

Limitations upon the right of free disposal of land being against the policy of our institutions, we find shortly after the Declaration of Independence a general tendency throughout the Union to either abolish estates tail or to restrict the time during which they should be allowed to exist.

Virginia, in 1776, passed its act abolishing entails, which is characterized by the Court in *Orndoff v. Turman*, 2 Leigh 200, as "a great general common recovery." By it fees tail were converted into fees simple, and, as a consequence, words which at common law in a deed or devise would have given an estate tail, are held to give an estate in fee, it having been decided that the statute did not effect any change in the meaning to be given to the words used, but merely converted the estate when an intent to give a fee-tail was discovered, *Tate v. Tally*, 3 Call 354. See Code, Virginia, 1860, 559.

The law is the same in West Virginia, Code 1868, 460.

In Alabama, estates tail are converted into fees simple in the hands of the donee or devisee in tail, Rev. St. 1867, § 1570; 1876, § 2179.

In Kentucky, estates tail are converted into fees simple, Gen. St. 1873, p. 585; and it is decided that since the statute, an estate tail convertible into a fee will not be raised by implication from the words "dying without issue," followed by a devise over, whether the first devise be for life or in tail; and that the failure of issue intended will be held to be a definite one, *Deboe v. Lowen*, 8 B. Mon. 616; *Sale v. Crutchfield*, 8 Bush. 636; *Daniel v. Thomson*, 14 B. Mon. 696.

In Connecticut, an estate given in tail becomes an estate in fee-simple in the issue of the first taker, Act 1784, Gen. Laws, Ch. VI., § 3.

In Florida, estates tail are prohibited, Thompson's Dig., Tit. 2, ch. 1, § 4, pl. 3.

In Georgia, estates tail are abolished; a gift or devise in tail becomes a fee-simple, and a limitation which, by the rules of construction would create

an estate tail, is interpreted to give an estate for life to the first taker with a remainder in fee to his children generally, not to the heir at common law, Acts 1799, 1821; Code 1873, p. 391.

In California, estates tail are abolished and a limitation in tail is declared to vest an estate in fee-simple absolute, unless there be a valid devise over; if there is a limitation over it is declared valid, although after a fee, and will vest on a definite failure of issue, Civil Code, 1872, §§ 763, 764.

In Indiana, estates tail are abolished, and if there be no valid remainder over, the fee vests in the donee or devisee, 1 Stats. 266; Rev. of 1876, Vol. I., p. 368.

In Iowa, all limitations which suspend the absolute power of alienation for any time longer than lives in being and twenty-one years after are void, Stats. 1873, § 355.

In New York, the statutes of 1782 and 1786 abolished entails and converted estates tail into fee-simple. The act of 1786 applied to estates tail in remainder as well as to those in possession, *Van Rensselaer v. Poucher*, 5 Denio 35; *Vanderheyden v. Crandall*, 2 Id. 9; *Wendell v. Crandall*, 1 N. Y. 491; *Van Rensselaer v. Kearney*, 11 How. 297; *Jackson v. Van Zandt*, 12 Johns. 169; and struck down remainders limited on a failure of the issue in tail, *Grout v. Townsend*, 2 Den. 336. The law at present in New York converts an estate tail, if followed by no valid remainder, a fee simple, 1 Stat. at Large, 670.

In Pennsylvania, by the act of April 27, 1855, § 1, P. L. 368, Purdon's Dig., Vol. I., p. 620, pl. 8, it was enacted that when "by any gift, conveyance, or devise an estate tail would be created according to the existing laws of the State, it shall be taken and construed to be an estate in fee-simple, and as such shall be inheritable and freely alienable."

This act applies only to estates tail created after its passage, *Reinhart v. Lantz*, 37 Pa. St. 491. It does not bring existing estates tail within the intestate act so that they will descend to the issue generally, and they, consequently, descend as at common law, *Guthrie's Appeal*, 37 Pa. St. 10; *Reinhart v. Lantz*, *supra*. Its general effect, as stated by STRONG, J., in *Nicholson v. Bettie*, 57 Pa. St. 384, is as follows: "The Act of 1855 practically makes the statute de donis inoperative. It remits us to the common law as it was before 13 Ed. I., and while it converts those which would have been estates tail, had it not been passed into estates in fee-simple, it has no effect upon executory devises." In other words, the act turns estates tail into fees conditional at common law.

In New Jersey, by the statutes of 1784 and 1786, it was provided that an estate tail after one descent should become an estate in fee-simple, and in 1799 the statute de donis was repealed. This repeal was held neither to

abolish existing estates tail nor to convert them into fees conditional at common law. In 1820 a further statute was passed, and the law of New Jersey at present is that a gift or devise in tail will give to the first taker an estate for life, and vest a remainder in fee in the heir, *Den ex d. Spachius v. Spachius*, 1 Harrison 172. See also *Den ex d. James v. Dubois*, Id. 285.

In Arkansas, an estate tail becomes a life estate in the first taker, with a remainder in fee-simple to the heir at common law, Rev. St. 1838, c. 31, § 5. The same law prevails in Illinois Rev. St. 1874, p. 273; 1880, p. 266, § 6; Vermont Gen. Laws, 1862, p. 446; and Colorado, Gen. Laws, 1877, c. xviii., § 165, p. 134.

¶ In Maryland, by act of 1786, ch. 45, it is declared that if any person seized of an estate in fee tail general created and acquired after the commencement of the act should die intestate, the lands should descend in fee-simple. The true construction of this act has been declared to be that the course or manner of transmitting the estate tail is changed only by making the land descend to all the children of the tenant in tail, *Smith v. Smith*, 2 H. & J. 314; *Roe, Lessee of Posey v. Budd*, 21 Md. 477, and that it does not let in the collateral heirs, *Smith v. Smith, supra*. The opinion that the latter class of heirs were enabled by the act to take, expressed in *Newton v. Griffith*, 1 H. & G. 111, would seem, therefore, to have been overruled. See Rev. St., Art. 47, § 1, Art. 44, § 7.

In Michigan, estates tail are abolished, and all estates of inheritance are declared to be fee-simple, either conditional or absolute. If there is no estate limited after, an estate of inheritance will be held a fee absolute, 2 Comp. L., 1871, c. cxlvii., § 3, p. 1325. The law is the same in Wisconsin, R. S. 1878, c. 95, § 2027, and Minnesota Rev. St. (Bissell) 613, § 3.

In Mississippi, estates tail are converted into fees simple, and it is provided that lands may be limited to two living donees in succession and to the heirs of the body of the remainder-man, and in default of heirs to the heirs of the donor in fee-simple, Stats. 1871, § 2286.

In Missouri, a devisee or donee in tail takes an estate for life with a remainder to his children as tenants in common, Stats. 1866, p. 442.

In New Hampshire, two statutes of 1789 impliedly repealed the statute *de donis*, the one (Sts. 1789, p. 76), by providing for the descent of entailed lands to all the children of the tenant equally, in case of intestacy the other (p. 77), by allowing all lands to be devised. In view of the statute it has been decided that the restrictive words, "heirs of the body," in a deed or devise have simply no effect, and make neither an estate conditional at common law nor an estate tail, *Jewell v. Warner*, 35 N. H. 176. Before this decision the general opinion in New Hampshire seemed to be that estates tail had not been abolished. See *Frost v. Cloutman*, 7 N. H. 9;

Hall v. Chaffee, 14 N. H. 215; *Bell v. Scammon*, 15 Id. 39; *Dunning v. Wherren*, 19 Id. 9; *Ladd v. Harvey*, 1 Fost. 526.

In Ohio, an estate tail becomes a fee-simple in the issue of the donee in tail, 1 R. S. (S. & C.) 550.

In North Carolina, every person seized of an estate in tail is deemed seized in fee, and all sales made by a tenant in tail in possession since January 1st, 1777, where the conveyance has been in fee-simple, are confirmed, *Battles Rev.* (1873) p. 383.

In Rhode Island, the statute provides that no person seized in fee-simple shall have a right to devise an estate in fee tail for a longer period than to the children of the first devisee, *Gen. Stat.*, c. 171, § 2, p. 313. The effect of this statute has been decided to continue the entailment through the life of the first devisee in tail, and then to enlarge the estate to a fee-simple in the children of said devisee, *Wilcox v. Heywood*, 12 R. I. 196, overrules the opinion in *Lippitt v. Huston*, 8 R. I. 415, 424. See also *Sutton v. Miles*, 10 R. I. 348.

Legislative Right to Change Course of Descent.

The right of the legislature to alter and direct by act the future descent of estates tail in existence at the time of the passage of the act has been considered by the courts. It would seem that there could be no question as to the right but for the clause in the Constitution of the United States protecting the obligation of contracts, and therefore, as has been held, there can be no question as to the validity of the acts passed before the adoption of the federal constitution, *Den ex d. James v. Dubois*, 1 Harrison 285, and the right of the legislature, after the adoption of the constitution, is thus asserted and supported by INGERSOLL, J., in *De Mill v. Lockwood*, 3 Blatch. 56, in which case a special act barring an entail was under consideration. "The legislature would have had a right to declare every fee tail to be a fee-simple in the tenant in tail, and after such general law, an estate in fee tail would in the tenant in tail be converted into a fee-simple. The legislature by so doing would not take any right of property from any one and vest it in another. They would not take any strict legal right from any one, for the issue have no right in the entailed estate which can be conveyed, but only a possibility or expectancy, or capacity of inheriting. He has no right to convey; and by the common law, such issue may in various ways, without any act done by him, or any act left undone by him, be deprived of that possibility or expectancy, the legislature have a right at all times, by a general law, to change the course of the inheritance, and deprive such issue of the capability of inheriting. . . . If this could be done by a general law, it could be done by a particular, special law."

Estates on Condition.

GRAY v. BLANCHARD.

Supreme Judicial Court of Massachusetts, March Term, 1829.

[Reported in 8 Pickering 234.]

The demandant, being owner of a parcel of land with a dwelling-house thereon, adjoining on the north to land with a dwelling-house thereon belonging to his sister, facing to the south, conveys to the tenant's grantor in fee simple, "provided, however, this conveyance is upon the condition, that no windows shall be placed in the north wall of the house aforesaid, or of any house to be erected on the premises, within thirty years from the date hereof." After the sister has conveyed her land to a stranger, the tenant mortgages by a deed reciting the foregoing provision, and afterward, while remaining in possession, makes windows in the north wall. *Held*, that the above clause was a condition, and not a covenant; that it was a valid condition; and that such breach of it worked a forfeiture of the estate, and gave the demandant a right to re-enter.

WRIT of entry sur disseizin to recover possession of a parcel of land and a dwelling-house thereon, situate in Atkinson street, in Boston. Trial before WILDE, J.

In 1801, the demandant owned a tract of land bounding easterly eighty feet on Atkinson street, and erected on the northern portion of it a dwelling-house facing to the south with the eastern end fronting on the street.

In 1802, he conveyed to Willett and Bullard a part of the tract, bounded northerly by the parcel upon which he had erected the house, and measuring fifty feet on the street.

In March 1803, he conveyed to his sister, Mrs. Haile Rand, the northerly part of the tract, describing it as bounded southerly by land of Willett and Bullard, and easterly on the street, there measuring thirty feet.

Willett and Bullard, having erected a dwelling-house, under the directions of the demandant, on the northern part of the land sold to them, reconveyed such part to the demandant, describing it as bounded east on the street, twenty-eight feet, west on land of Dorr, twenty-eight feet, and north on land of the demandant.

On the 28th of August 1804, the demandant conveyed the tract now in question to William Blanchard, describing it as bounded east on the street, twenty-seven feet, south on land of Dillaway, west on land of Dorr, twenty-seven feet, and north on other land of the demandant, being part of the land purchased of Willett and Bullard; *habendum* in fee-simple; "provided, however, this conveyance is upon the condition, that no windows shall be placed in the north wall of the house aforesaid, or of any house to be erected on the premises, within thirty years from the date hereof, and also upon the condition, that no building shall be erected upon the strip of land at the east end of said house for the space of thirty years from the date hereof, but during said term said strip of land, measuring twenty-seven feet on Atkinson street, and three feet three inches in depth from said street, shall remain without any incumbrances except the fences as they now stand."

On the 24th of October 1821, William Blanchard conveyed the same land to the tenant, "subject to the terms and conditions mentioned and contained in the original deed from said Benjamin Gray to said William Blanchard, reference being thereto had."

On November 1, 1821, the tenant mortgaged the land to Jonathan Amory, by a deed in which the conditions above quoted are recited at length.

It was proved, that the house on the land in question, is a brick house of about forty feet in length and eighteen in width, the north wall being towards the house conveyed to Mrs. Rand, and that at the time of the conveyance to William Blanchard, the north wall was without any aperture except one doorway; and that in 1822 the tenant caused two windows to be made in this wall, which have ever since remained there.

The demandant proved an entry upon the demanded premises for breach of condition.

The tenant gave in evidence a deed of Mrs. Rand, dated in 1813, whereby she conveyed her land to George Blanchard, describing it as bounded southerly on land of William Blanchard. But the demandant claims to be the owner of a strip of land one foot wide, lying between the demanded premises and the land conveyed by him to Mrs. Rand.

It was admitted that the demandant, at the time when he gave the deed to William Blanchard, had no interest in the house and land conveyed to Mrs. Rand, and has never since had any, and that none of his

family have had any interest therein since his sister made the conveyance to George Blanchard.

The jury were instructed to find a verdict for the demandant; which was to be subject to the opinion of the Court.

Prescott and Gorham for the tenant. The provision in the deed from the demandant to William Blanchard, considered as a condition, is void.

1. It is against the policy of the law, being idle and useless to the grantor and embarrassing to the grantee. In the case of a lease, the grantor owns the estate and may prescribe the mode of managing it; and if there is a forfeiture, the lessee ceases to pay rent; but here there is a barren condition annexed to a fee-simple, in land in which the grantor has parted with his whole estate. 2. The condition is repugnant to the grant. It is a restraint on the fair and profitable use of the land, when no estate remains in the grantor. The condition is not annexed to a collateral thing, but to the estate itself which is the subject of the grant. Co. Lit. 223; Ibid. 206 b; *Newkerk v. Newkerk*, 2 Caines's R. 345; *Scovell v. Cabell*, Cro. Eliz. 107; *Stukely v. Butler*, Hob. 170; *Moore and Savil's case*, 2 Leon. 132; *Jervis v. Bruton*, 2 Vern. 251; 2 Bl. Com. 381; *Mildmay's case*, 6 Co. 41; 5 Vin. 105, *Condition, A, a*.

But suppose the demandant had been, at the time of the grant and ever since, the owner of the adjoining estate and wished to benefit it, the Court will consider the provision in question as the grant of an easement by the grantee or a covenant, and not as a condition. On the breach of a condition, the grantor only and his heirs can enter; and if he has assigned the adjoining land and then enters, he holds the estate discharged of the condition and the owner of the adjoining land derives no benefit from the condition. Lit. § 347; Co. Lit. 214 a, 214 b, 215 b; Com. Dig. *Condition, A 6*; Bac. Abr. *Covenant, A*; 2 Cruise's Dig. 6. Covenant will lie on a deed poll accepted by the grantee. *Ewer v. Strickland*, Cro. Jac. 240; *Brett v. Cumberland*, Ibid. 399, 521; *Knipe v. Palmer*, 2 Wils. 130; Co. Lit. 231. The clause may be bad as a condition, but good as a contract. *Freeman v. Freeman*, 2 Vern. 233; Shep. Touch. 368. *Holms v. Seller*, 3 Lev. 305. The only way of effecting the intent of the parties, is to construe it as a reservation or covenant, running with the land conveyed to Mrs. Rand. The party who took the deed could not have understood that the estate was to be defeated by the non-performance of the supposed condition, there being no

words of re-entry, nor any words signifying that the deed would become void.

Putting in the windows was a trespass by a tenant at will, and ought not to work a forfeiture as against the mortgagee, who has the fee-simple.

S. Hubbard and *C. G. Loring*, *contra*, to the point, that the words used constitute a condition, cited *Shep. Touch.* 121, 122; *Bac. Abr. Condition A, G*; *Vin. Condition H*, and notes; *Lit.* § 328, 330, 331; *Jackson v. Allen*, 3 Cowen 221. That the condition was not repugnant to the grant, *Shep. Touch.* 129, 131; *Large's case*, 2 Leon. 82, and 3 Leon. 182; *Dyer*, 318, pl. 12; *Bac. Abr. Condition, L*; *Vin. Condition, Z*, pl. 4 and pl. 32; *Com. Dig. Condition, D* 6; *Doe v. Pearson*, 6 East 173. That a court of equity will not relieve when the forfeiture is voluntary, *Rolfe v. Harris*, 2 Price 210, *note*. That if the condition had been idle and useless, yet being express and upon a valuable consideration (the price of the land being of course less in consequence of the condition), it must be enforced, *Jackson v. Brownell*, 1 Johns. R. 267; *Skinner v. White*, 17 Johns. R. 357; *Wheeler v. Walker*, 2 Connect. R. 196; *King v. Withers*, Finch's Prec. 348. That the lapse of time since the breach of the condition was not a waiver, *Jackson v. Chrysler*, 1 Johns. Cas. 125; *Doe v. Allen*, 3 Taunt. 78; *Braddick v. Thompson*, 8 East 344; *Roe v. Harrison*, 2 T. R. 425. That covenant would not lie, *Goodwin v. Gilbert*, 9 Mass. R. 510.

The opinion of the Court was delivered at this term, by

PARKER, C. J.—The tenant moves to have the verdict set aside, on several grounds.

First, because the words in the deed do not import a condition, the breach of which will work a forfeiture of the estate, but only a covenant, entitling the demandant to his action for damages. But this is untenable. The words are apt to create a condition; there is no ambiguity, no room for construction; and they cannot be distorted so as to convey a different sense from that which was palpably the intent of the parties. The word "*provided*" alone, may constitute a condition, but here the very term is used which is often implied from the use of other terms. "*This conveyance is upon the condition,*" can mean nothing more nor less, than their natural import; and we cannot help the folly of parties who consent to take estates upon onerous conditions, by con-

verting conditions into covenants. It would be quite as well to say that the words mean nothing, and so ought to be rejected altogether. No authority has been cited which bears out this suggestion; indeed, the authorities are all against it.

It is then said, that this condition is void, being idle and useless, and so against the policy of the law. But who shall judge over the head of the grantor, that this condition is idle and useless? At the time of his conveyance to William Blanchard, his sister owned, by conveyance from him, the next adjoining lot to the northward, with the front of her dwelling-house towards this north wall. He probably intended to protect this estate from being overlooked from windows in that wall, the house in question having been built with this dead wall under his direction. This may have been important to the enjoyment and the value of his sister's estate; and there seems to be no good reason why, in disposing of the demanded premises, he should not provide for her accommodation. Those who hold under her may have considered this restriction on the estate as an inducement to purchase. The grantee was not surprised into the bargain, nor those who hold under him, the condition being inserted in all the deeds; and if the estate was of less value on account of this restriction, they were compensated in the price; at any rate, it was a voluntary bargain, and if they did not choose to take the estate *cum onere*, they should have rejected it altogether. Every proprietor of an estate has *jus disponendi*. He may grant it with or without condition; and if he grants it upon condition directly, the estate of the grantee will terminate with the breach of the condition, if the grantor chooses to avail himself of the forfeiture and enter for the breach.

It is next argued that this condition is void, as being repugnant to the grant, restraining the beneficial use of the estate. Without doubt, conditions of the nature supposed are void, and the estate is absolute; but the law very clearly defines this rule, and the cases cited to support this position show the limitation and the exceptions to the rule.

A lease for two years, provided the lessee occupy but one; this is repugnant and senseless, and the proviso shall be rejected. *Scovell v. Cabell*, Cro. Eliz. 107.

Grant of a house upon condition not to meddle with the shops, the shops being part of the house; this is of the same nature. Hob. 170.

So a grant of land or rents in fee-simple, upon condition that the

grantee shall not alien, or that his widow shall not have dower; these conditions are void, as clearly repugnant to the grant; Shep. Touch. 129, 131; for it is of the essence of a fee-simple estate, that it shall be alienable and subject to dower.

But if the condition be that the grantee shall not alien to particular persons, or within a reasonable limited period, these conditions shall stand, not being inconsistent with the nature of the estate granted. Co. Lit. 223.

If one make a feoffment in fee on condition that the feoffee shall retain the land for twenty years without interruption, it seems this is a good condition and not repugnant. Shep. Touch. 131. A feoffment in fee with a condition that the feoffee shall not enjoy the land or take the profits, or that his heirs shall not inherit it, or that the feoffee shall do no waste, or that his wife shall not be endowed; these are all repugnant and void. Shep. Touch. 131. And the same law is of a grant by deed of bargain and sale, for by our law this is an entire substitute for a feoffment.

But partial and temporary restrictions as to the use, may be consistent with the estate granted, and so may stand.

A condition in a deed of a house, that there should be no windows in it, or no passage in and out, or that the grantee should never occupy or sell it, would come within the rule and be void; but that there should be no door or window on one side or end, that it should not be sold for several years, or to a particular person, would fall within the exception to the rule, and form a valid condition.

Again, it is said that the demandant not owning any land adjoining, he has no interest in the condition, and so cannot avail himself of the forfeiture. But it is not necessary, in order to make a condition valid, that the party creating it should have any beneficial interest in any other estate which may be usefully affected by the condition. He may have conveyed an adjoining estate for the benefit of which this condition was created. He may have received a greater price for that estate on account of this condition, and justice to others may require that he should exact its performance.

It is said to be a general rule, that when a man hath a thing, he may condition with it as he will. This, however, is subject to the foregoing rule. Shep. Touch. 118. And the condition cannot be reserved to a stranger, but by and to him who doth make the estate. Neither can it

be granted over to another, except to and with the land or thing unto which it is annexed and incident. Shep. Touch., 120.

It seems to us that there are many things which may be provided for as conditions in a deed, which, though of small consideration in the view of a stranger, may be thought of great importance by the grantor. A man has a vacant lot in front of his dwelling-house, which somebody is desirous to buy, and he is willing to sell, if thereby his light and air shall not be too much obstructed. May he not sell it under a condition, that no building shall be erected beyond a certain height, or within a certain distance from his house, or that the land shall not be used for the purposes of a tavern, or for any particular business which is likely to be noisy or troublesome, at least for a limited number of years? Who is prejudiced by such a condition? The purchaser and all who may claim under him have notice of the restriction, and if it diminishes the value of the land, they get their compensation in the price.

The common law does not so interfere with the right of disposing of estates; as appears from the authorities cited. Neither is there anything unreasonable in the particular condition of this deed. The tenant's house is built with its easterly end on the street, its front to the south. Such houses are usually provided with light from the front and the ends. This very house had stood many years without windows in the back wall. Certainly if it is a hard thing for the demandant to exact the forfeiture, it was a foolish thing in the tenant to give him the opportunity.

Then it is thought that the various conveyances under the original grantee of the demandant, William Blanchard, and the tenant, who has charged the land with a mortgage, may have destroyed this condition, or defeated the right of the demandant to enter for the breach of it. But the law is otherwise.

"The estates of both parties are so suspended by the condition, that neither of them alone can well make any estate or charge of or upon the land;" that is, free from the burthen of the condition. For he that parteth "with the estate and hath nothing but a possibility to have the thing again upon the performance or breach of the condition, cannot grant or charge the thing at all. And if he that hath the estate, grant or charge it, it will be subject to the condition still; for the condition doth always attend and wait upon the estate or thing whereunto it is annexed." "And when the condition is broken or performed, etc., the

whole estate shall be defeated and the whole estate of *the whole*, and not of some part only shall be avoided, except by agreement the condition is limited to part." Shep. Touch. 120, 121.

The last point made in the argument for the tenant is, that there being no clause of re-entry for breach of condition in the deed, the provision is not strictly a condition going to the forfeiture of the estate, but may for this reason be construed into a covenant. But here again the law seems to be clear the other way.

A clause of re-entry is not necessary to make a condition. *Proviso, ita quod, sub conditione*, make the estate conditional. Com. Dig. *Condition*, A 2. Other words, such as *si, si contingat*, do not make a condition, which will work a forfeiture, without clause of re-entry. Lit. § 331; Shep. Touch. 121.

It has been suggested also, that as the proprietor of the estate next north of the wall, must have known of the placing windows there, and did not prohibit or complain of the act, his silence should be construed a waiver of the condition, so as to defeat the demandant's right to re-enter. But there are two objections to this; first, that the then owner of the adjoining estate had no legal interest in that condition, and therefore could not waive it. His silence might result from a reliance that the demandant, under whom derivatively he held, would vindicate his own rights. Secondly, a mere indulgence is never to be construed into a waiver of a breach of condition; and so are the authorities. If the windows had been made before the conveyance in mortgage by the tenant to Amory, the demandant knowing that the condition had been broken and having omitted to enter for breach, there would be a strong case in equity for an injunction from a court with competent jurisdiction on the subject; but the mortgage was made before the breach of condition. It has been strongly urged, that after the mortgage, Charles Blanchard was only tenant at the will of the mortgagee, and that his act, unauthorized by the mortgagee, could not work a forfeiture. But he was, to everybody but the mortgagee, tenant in fee; and remaining in possession with the consent of the mortgagee, his acts have the same effect as if he had not conveyed in mortgage. The mortgagee's estate was subject to the same condition, not only by virtue of the original deed from the demandant, but the condition was expressed also in his deed from the tenant; so that he should have dispossessed the tenant, if he would have avoided the effect of his acts.

We therefore see no ground on which, consistently with the rules of law, we can deny the demandant's claim. It is a harsh proceeding on his part, but it is according to his contract, which must be enforced, if he insists upon it.

Judgment according to verdict.

"A condition annexed to the realty, whereof Littleton here speaketh," says Coke, "in the legal understanding *est modus*, a quality annexed by him that hath estate, interest, or right to the same, whereby an estate, etc., may either be defeated, enlarged, or created upon an uncertain event. *Conditio dicitur cum quid casum incertum qui potest tendere ad esse aut non esse confertur*," Co. Lit. 201 a.

Kinds of Conditions.

Conditions are primarily of two kinds, (1) conditions in law, or those conditions which are inseparably annexed to an estate by the law itself, without aid from any act or declaration of either grantor or grantee, and arise out of the very essence and constitution of the estate itself, and (2) conditions in deed; it is of the latter class that Coke above speaks and with which we are at present concerned, since the conditions of the other class can be more conveniently discussed in treating of the incidents of the estates to which they are respectively attached.

An estate on condition in deed is thus defined in *Wheeler v. Walker*, 2 Conn. 196, "An estate on condition expressed in the grant or devise itself is where the estate granted has a qualification annexed whereby the estate shall commence, be enlarged, or defeated upon performance or breach of such qualification or condition." See also *Laberee v. Carleton*, 53 Me. 211.

Creation of Condition.

There are certain technical words proper in themselves to make a condition, these are *sub conditione*, *proviso*, *itaquod*, Co. Lit. 203 b, and *quod si contingat* if followed by a clause of reëntry, Id. 204 b, *Stanley v. Colt*, 5 Wall. 119; *Wheeler v. Walker*, *supra*; *Hooper v. Cummings*, 45 Me. 359; *Paschall v. Passmore*, 15 Pa. St. 295; *Rawson v. Inhabitants of School District No. 5*, 7 Allen 125; *Warner v. Bennett*, 31 Conn. 468; *Gray v. Blanchard*, 8 Pick. 284.

But these words are not necessary to create a condition; it may be cre-

ated by any words which show a clear, unmistakable intention on the part of a grantor or deviser to create an estate on condition, regard being had to the whole of the deed or will in which they occur, *Bacon v. Huntington*, 14 Conn. 92; *Hapgood v. Houghton*, 22 Pick. 480; *Lessee of Worman v. Teagarden*, 2 Ohio St. 380; *Watters v. Bredin*, 70 Pa. St. 235; *Underhill v. Saratoga and Washington R. R. Co.*, 20 Barb. 458; *Hamilton v. Kneeland*, 1 Nev. 40. A provision for reëntry is a distinctive characteristic of an estate on condition, and where in a deed the grantor has reserved the right of reëntry, upon the happening of any specified event, in order to revest in himself his former estate, there the estate granted will be held to be one upon condition, *Attorney-General v. Merrimack Manufacturing Co.*, 14 Gray 612, and this has been held where the provision for reëntry was appended to words of covenant, *Gibert v. Peteler*, 38 N. Y. 165.

As the technical words above mentioned are not absolutely essential to the existence of a condition, so their use does not necessarily create one, but may be so controlled by the context of the instrument in which the technical words occur as to fail of that effect. The rule as to them is thus stated by BELL, J., in *Paschall v. Passmore*, 15 Pa. St. 295, "these conditional words sometimes serve to work a qualification or limitation and condition, and sometimes a covenant only, according to the intention of the parties and the manner in which they are used in a conveyance. In *Cromwell's case*, 2 Co. 71 a, . . . it was settled, that though the words *proviso* and *sub conditione* are apt to make a condition, yet to confer upon them this effect three things are necessary; first, that the clause wherein they occur have no dependence on another in the deed, but stand originally by and of itself; second, that it be the language of the feoffor, donor, lessor, etc., or may be attributed indifferently to both; and third and principally, that it be compulsory to enforce the bargainee, feoffee, donee, etc., to do an act the omission of which may work a forfeiture." See also *Episcopal City Mission v. Appleton*, 117 Mass. 326; *Sohier v. Trinity Church*, 109 Id. 1; *Chapin v. Harris*, 8 Allen 594; *Stanley v. Colt*, *supra*. And whatever words are relied on as creating a condition must not only be such as of themselves would create a condition, but must be so connected with the grant as to qualify or restrain it. *Laberee v. Carlton*, *supra*.

A condition may be created by a reference in an instrument to a condition contained in another paper, as by a reference in a deed to an agreement to convey on condition, with a recital that the deed is made in pursuance thereof, *Bear v. Whisler*, 7 Watts 144; *Merritt v. Harris*, 102 Mass. 326, or by a reference in a codicil to the provisions of a will, *Tilden v. Tilden*, 13 Gray 103; and in a case, where on the back of a deed there was a recital that the estate was conveyed upon a certain condition, which recital was

signed by the grantee, it was held that a condition was well created in favor of the grantor, *Barker v. Cobb*, 36 N. H. 344; but a mere recital in the deed that it has been made upon a certain consideration will not raise a condition, as where a deed set forth that the estate conveyed thereby was given to commissioners of a county in consideration of a county seat having been located on the premises, it was held that there was no condition that the county seat should be kept there, *Harris v. Shaw*, 13 Ill. 456; and see *Perry v. Scott*, 51 Pa. St. 119, where the deed recited that it was made in consideration of natural love and affection, and that the grantee, the grantor's son, had promised to remain with the grantor and to support his widow after the grantor's death, the consideration recited was held not to constitute a condition which could be enforced by an ejectment; and this is the case even where an estate on condition is transferred by the grantee thereof to another in consideration that the condition be performed by the second grantee, in this case there will be no condition vested in the first grantee, but the liability to him on the part of the second grantee will be personal only. *Norris v. Laberee*, 58 Me. 260.

A condition will not be raised by implication from a declaration in the deed or devise, that the grant is made for a special and particular purpose without being coupled with words appropriate to make a condition, *Packard v. Ames*, 16 Gray 327; *Bigelow v. Barr*, 4 Ohio 358, or from the state of affairs existing at the time of the grant. An example of this latter position is found in *Southard v. Central R. R. of New Jersey*, 2 Dutch. 13. At the time of the grant in that case, the grantee, a railroad company, was not permitted by its charter to extend its road beyond Somerville, where the land granted was located, and the grant was undoubtedly made in view of the benefit which would accrue to the grantor, an owner of land in Somerville, from the town being made a railway terminus; yet it was held that there was no implied condition either that the grantee should not obtain an enlargement of its franchise and extend its road beyond Somerville, or allow its privileges to become vested in another corporation whose charter permitted such extension.

A condition will not be readily raised or enlarged by construction. In *Jennings v. O'Brien*, 47 Iowa 392, a father made a conveyance to his son for the consideration of one dollar, on condition that the son should not alien the land during the lifetime of the father; it was held that there was no condition to support the father during life. See also *Supervisors of Warren County v. Patterson*, 56 Ill. 111; *Gadberry v. Sheppard*, 27 Miss. 203.

As the policy of law is to render the alienation and transfer of property as free as possible, conditions are not favored in law; and, therefore, whenever words can be construed indifferently as a condition, reservation, or a

covenant, the tendency of the courts is to construe them as either of the latter rather than as the former. *Chapin v. School District No. 2*, 35 N. H. 445; *Hoyt v. Kimball*, 49 Id. 326; *Wheeler v. Dascomb*, 3 Cush. 285; *Thornton v. Trammell*, 39 Ga. 202; *Paschall v. Passmore*, 15 Pa. St. 295; *Kreutz v. McKnight*, 51 Id. 232.

A condition cannot be engrafted upon a conveyance, by parole, *Marshall County High School v. Iowa Evangelical Synod*, 28 Iowa 360; *Thompson v. Thompson*, 9 Id. 323; *Rogers v. Sebastian County*, 21 Ark. 440; *Moser v. Miller*, 7 Watts 156; *Chapman v. Gordon*, 29 Ga. 250; *Dunbar v. Stickler*, 45 Iowa 384.

Condition Precedent or Subsequent.

Conditions may be either subsequent or precedent; and it is sometimes a little difficult to determine under which head a given condition falls, since no technical words exist which will determine absolutely the character of the condition. "It is not now the employment of any particular word which determines a condition to be precedent or subsequent, but the manifest intention of the parties. One of the rules upon which the construction depends is, that when the mutual covenants go to the whole of the consideration on both sides, they are mutual conditions, the one precedent to the other, as where in the conveyance of property the whole of the consideration money is either to be paid or secured on the delivery of the deed, which is a plain case of stipulation for a contemporaneous performance, a performance *uno flatu*, and where neither party intends to trust the other." CARPENTER, J., in *Shinn v. Roberts*, Spen. (N. J.) 435. See also *Jones v. Chesapeake & Ohio R. R. Co.*, 14 W. Va. 514. It may be laid down as a rule that where the act of condition necessarily precedes the vesting of the estate—as, for instance, a gift to a person if he reach a certain age—the condition will be held to be precedent; but if the act can be performed as well after as before the vesting of the estate, then the condition will be held subsequent, unless an intention of the grantor or deviser that it shall be precedent is clearly manifested, *Finlay v. King's Lessee*, 3 Pet. 346; *Martin v. Ballou*, 13 Barb. 119; *Underhill v. S. & W. R. R. Co.*, 20 Id. 458; *Parker v. Nichols*, 7 Pick. 111; *Burnett v. Strong*, 26 Miss. 116; *Bell County v. Alexander*, 22 Tex. 350. A condition in a devise, that a devisee should marry a certain other person, has been held a condition subsequent, *Finlay v. King's Lessee*, *supra*. So also where the condition in a devise was that the one who, by its terms, should be entitled to the estate at the age of twenty-one, should change his name, and that in case he did not do so within a reasonable time, the land should follow the direction of a devise over, *Taylor v. Mason*,

9 Wheat. 325. So a condition that so soon as the devisee comes into possession of the estate he shall take a certain name, *Webster v. Cooper*, 14 How. 488; or a condition that the grantee or devisee shall pay an annuity, and in such case security will not be exacted for its payment, *Beck v. Montgomery*, 7 How. (Miss.) 39; or that no claim be made against the estate of the devisor, *Sackett v. Mallory*, 1 Metc. 355; or a condition avoiding a conveyance in case it afterwards appears that the grantee was not, at the time of the conveyance, seized of certain lands adjoining those conveyed to him, *Towle v. Smith*, 2 Robt. 489. A condition that the grantee shall allow the grantor's wife to have the use, occupation, and improvement of the land demised during her natural life is a condition subsequent, *Tallman v. Snow*, 35 Me. 342. But in a devise to a widow for life, with power to sell the land if the income of the property be not sufficient to support her, insufficiency of support is a condition precedent to the vesting of a fee, for the purpose of conveyance, in the widow and must be proved in order to sustain the title of one claiming title in fee under the widow in an ejectment, *Minot v. Prescott*, 14 Mass. 495; and where a deed recited that the grantor, being desirous of securing the completion of a certain dam on or before a certain date, granted an estate to the party of the second part upon a trust that if a certain hydraulic company should erect such a dam by the said date, the grantee should deliver to the said company a deed for the said estate, the building of the dam was held a condition precedent to the vesting of the estate in the hydraulic company, *Wilson v. Galt*, 18 Ill. 431, and in a devise to a person, if he shall live to become of age, or when he shall become of lawful age, the attainment of twenty-one years is a condition precedent. *Cox v. Bird*, 65 Ind. 277.

Of what a Condition may consist.

A condition may be made of almost anything that is not illegal or unreasonable, on the principle that the owner of land, who is not obliged to transfer it at all, may attach to its transfer such conditions and restrictions as he pleases, and in view of which the grantee takes the land, so long as they are not in contravention of any policy of law.

A condition may be made of the payment of rent, *Van Rensselaer v. Ball*, 19 N. Y. 100; *Van Rensselaer v. Slingerland*, 26 Id. 580; *Van Rensselaer v. Dennison*, 35 Id. 393; *Hosford v. Ballard*, 39 Id. (Tiffany) 147, or that a certain proportion of the produce of the land granted shall be delivered to the grantor, *Frost v. Butler*, 7 Greenl. 225. It is a good condition that a railroad company shall keep open as a public street part of the land conveyed to it, *Tinkham v. Erie R. R.*, 53 Barb. 393. A condition that

the grantee pay the expenses of a certain lawsuit, *Hihn v. Peck*, 30 Cal. 280, or indemnify the grantor against a bond and mortgage, *Michigan State Bank v. Hastings*, 1 Dougl. 225; *Rowell v. Jewett*, 69 Me. 293; *Sanborn v. Woodman*, 5 Cush. 36, is good.

A very common condition in rural districts is that the grantee shall support the grantor during life, *Spaulding v. Hallenbeck*, 39 Barb. 79; *Sheaffer v. Sheaffer*, 37 Pa. St. 525; *Hershman v. Hershman*, 63 Ind. 451; *Rollins v. Riley*, 44 N. H. 9; *Rowell v. Jewett*, 69 Me. 293, or support the grantor or devisor's wife, *Tanner v. Van Bibber*, 2 Duv. 550, or child, or some other person designated by him, *Wilson v. Wilson*, 38 Me. 18; *Marwick v. Andrews*, 25 Id. 525; and it seems that the condition for support partakes of a personal character, and that the conveyance of the estate will not shift the obligation to perform the condition from the original grantee, *Barker v. Cobb*, 36 N. H. 344; *Eastman v. Batchelder*, Id. 141.

Among examples of other conditions which have been sustained by the courts may be mentioned a condition that no sale of the property conveyed shall be made without first giving the grantor and his heirs an opportunity to purchase it, *Jackson v. Schutz*, 18 Johns. 174; that certain buildings shall be erected upon the premises, *Hunt v. Beeson*, 18 Ind. 380; *McKelway v. Seymour*, 29 N. J. Law 321; *Allen v. Howe*, 105 Mass. 241; *Dolan v. Mayor and Council of Baltimore*, 4 Gill 394; that the devisee shall not contest the will containing the devise, *Chew's Appeal*, 45 Pa. St. 228; that a church erected, or to be erected, on the premises granted shall remain a free church, *Woodworth v. Payne*, 74 N. Y. 196; that the devisee shall keep a house in repair, *Tilden v. Tilden*, 13 Gray 103; that no buildings be erected on the premises within a certain distance of a street line, *Nowell v. Boston Academy of Notre Dame*, 130 Mass. 209; that a certain deed shall be confirmed, *Spofford v. Manning*, 6 Paige 383; that the grantee shall return to a certain place, *Reeves v. Craig*, 1 Winst. 209; *M'Carthy v. Dawson*, 1 Whart. 4; that land or its produce be applied to the support of certain clergymen, *Austin v. Cambridgeport Parish*, 21 Pick. 215.

While, however, great liberty is allowed in the creation of conditions, there are nevertheless some conditions and restrictions which the law prohibits as being contrary to public policy or as being repugnant to the estate granted.

First, it may be stated that a condition in general restraint of marriage is bad as against public policy and is incapable of enforcement; but to render a condition in restraint of marriage void, it must be in fact general, or at least unreasonable, and a condition that a person shall not marry before attaining a certain age, provided the age fixed be not an unreasonable one, is a good condition, *Shackelford v. Hall*, 19 Ill. 212. As to what has gen-

erally been considered a reasonable restriction under such circumstances, it was said in the case just cited by CATON, C. J., "An examination of the subject will show that the courts have rarely held such a condition void, although it might appear harsh, arbitrary, and unreasonable, so as it did not absolutely prohibit the marriage of the party within the period wherein issue of the marriage might be expected." It has been sometimes held that, where the condition in restraint of marriage is followed by a devise over on the occurrence of the breach, the condition will be sustained; but this is not the case where the devise over is to the heirs of the devisor, *Randall v. Marble*, 69 Me. 310.

A distinction has been taken between the condition in restraint of marriage in an ordinary deed or devise where the restraint is imposed on some person other than the widow of the grantor or devisor and a condition annexed by a husband to a devise to his widow, restraining her from a second marriage; and it now seems well settled that a condition in restraint of a second marriage contained in a devise by the husband of the devisee will be upheld, and this in spite of the position taken by some judges and eloquently urged by counsel that the policy of the law is opposed to any restraint upon the legitimate increase of population, and that restraints upon second marriage are odious to the common law and to public policy, as being the invention of ecclesiastics, to whom such marriages were distasteful. In the case of the *Commonwealth v. Stauffer*, 10 Pa. St. 350, where the devise was to a widow on condition of her not remarrying, the Court of Common Pleas, relying on the text writers and on a *nisi prius* opinion of KENNEDY, J., in *Middleton v. Rice*, 6 Pa. Law Journ. 234, held the condition void, the learned president of the Court, after a glowing eulogium of marriage and its consequences, saying, "The principles of morality—the policy of the nation—the doctrines of the common law—the law of nature and the law of God—unite in condemning as void the condition attempted to be imposed by this testator upon his widow." Nevertheless, when the case came to the Supreme Court, the decision of the Court below was reversed, and in answer to the argument pressed at bar by counsel that a general restraint of marriage was void, GIBSON, C. J., in the course of the opinion of the Court said: "I know of no policy on which such a point could be rested, except the policy which for the sake of a division of labor would make one man maintain the children begotten by another. It would be extremely difficult to say why a husband should not be at liberty to leave a homestead to his wife without being compelled to let her share it with a successor to his bed, and to use it as a nest to hatch a brood of strangers to his blood." See also *Vaughn v. Lovejoy*, 34 Ala. 437; *Dumely v. Schoeffler*, 24 Mo. 170; *Steger's Estate*, 3 W. N. C. 368; *Hough's Estate*, 7 Id. 559; *Bond-*

bright's Appeal, 9 Id. 475; *Phillips v. Medbury*, 7 Conn. 568; *O'Neal v. Ward*, 2 H. & McH. 93; *Luigart v. Ripley*, 19 Ohio St. 24, and a condition in such case will be good without a devise over, *Coppage v. Alexander's Heirs*, 2 B. Mon. 313; *McCullough's Appeal*, 12 Pa. St. 197; see, contra, *Binnerman v. Weaver*, 8 Md. 517; but in the same State it is held that in a will, any devise over will be sufficient to uphold such a condition, for the reason that it shows the intent of the testator to make a further disposition of the property in the event of the marriage. In *Gough v. Gough*, 26 Md. 347, the testator made a devise to his wife, "provided she will not marry . . . any man after my death;" this was followed by a devise over to the testator's heirs of the same estate that, but for the will, they would have taken by descent. It was argued that the case presented was that of a devise on condition, with no devise over in case of breach, since the devisee would take by the worthier title, and hence the condition was void. The Court, however, held otherwise, BOWIE, C. J., saying, "The argument, although ingenious, is not conclusive. The devise over makes the primary bequest or devise valid, because it shows the intent of the testator to make further testamentary disposition in the event of the first devisee's marrying again, and in furtherance of that intent, in regard for the ulterior disposition in favor of the substituted devisee, the law gives it effect. This intent is not less obvious when the devisee stands in such relation to the testator that he or she comes in by a superior title, notwithstanding the devise, than when the ulterior devise is to a stranger." It may be noticed, in passing, that equitable relief may be given even in some cases of valid condition in restraint of marriage, as in *Shackelford v. Hall*, *supra*, where the person restrained from marriage was also the heir-at-law of the testator, and married a short time before the expiration of the time limited; the Court held that the forfeiture should not be enforced without proof of knowledge, on the part of the heir, of the condition. In Georgia the subject of conditions in restraint of marriage has been made the subject of statutory regulation. It being enacted by the code, that "every effort to restrain or discourage marriage by contract, condition, limitation, or otherwise, is invalid and void. Prohibitions of marriage to a particular person or persons, or before a certain reasonable age, or other prudential provisions looking only to the interest of the person to be benefited, and not in general restraint of marriage, will be allowed and held valid." Code, Tit. 2, Ch. 1, Art. 1, Sect. 1, § 1697, p. 294.

Conditions in general restraint of alienation are void, both as contrary to the policy of law in this country, and as repugnant to the estate granted, as said by Littleton, Sect. 360: "Also, if a feoffment be made upon this condition that the feoffee shall not alien the land to any, this condition is void,

because when a man so enfeoffed of lands or tenements, he hath power to alien them to any person by the law. For if such a condition should be good, then the condition should oust him of all power which the law gives him, which should be against reason, and therefore such a condition is void;" and Coke adds, "and the like law is of a devise in fee upon condition that the devisee shall not alien, the condition is void. And so it is of a grant, release, confirmation, or any other conveyance whereby a fee-simple doth pass. For it is absurd and repugnant to reason that he that hath no possibility to have the land revert to him should restrain his feoffee in fee-simple of all his power to alien. And so it is if a man be possessed of a lease for years, or of a horse, or of any other chattel, real or personal, and give or sell his whole interest or property therein upon condition that the donee or vendee shall not alien the same, the same is void, because his whole interest and property is out of him, so as he hath no possibility of a reverter, and it is against trade and traffic and bargaining and contracting between man and man; and it is within the reason of our author that it should ouster him of all power given to him. *Iniquum est ingenuis hominibus non esse liberam suarum alienationem*; and *rerum suarum quilibet est moderator et arbiter*; and again, *regulariter non valet pactum de re mea non alienda*. But these are to be understood of conditions annexed to the grant or sale itself, in respect to this repugnancy, and not to any other collateral thing, as hereafter shall appear." See also St. Germain, Doct. & Stud., Dial. I., ch. 24.

The law at the present day is the same, and may be stated to be that a condition in general restraint of alienation, or that the grantee shall not alien during his life, is void, *Blackstone Bank v. Davis*, 21 Pick. 42; *Reifsnyder v. Hunter*, 19 Pa. St. 41; *Walker v. Vincent*, Id. 369; *Dick v. Pitchford*, 1 Dev. & Bat. Eq. 480; *Schermerhorn v. Negus*, 1 Denio 448; *Gleason v. Fayerweather*, 4 Gray 348; *Hall v. Tufts*, 18 Pick. 455. With regard to conditions imposing partial restraints upon alienation, the authorities are, however, not at one. A long line of cases holds that a condition imposing a partial restraint as to time, so long as the time is not unreasonably long, will be sustained, *Cornelius v. Ivins*, 2 Dutch. 376; *Langdon v. Ingram's Guardian*, 28 Ind. 360; *Hill v. Hill*, 4 Barb. 419; *McWilliams v. Nisley*, 2 S. & R. 507; *Stewart v. Brady*, 3 Bush 623; *Stewart v. Barrow*, 7 Id. 368. A condition that an estate should not be alienated except to certain persons for fifteen years, has been held reasonable, *Hill v. Hill*, *supra*, but where a devise was made in fee, with a restriction against alienation in less than twenty-five years from the death of the testator, the condition was held void as violating the rule against perpetuities, *Oxley v. Lane*, 35 N. Y. 347. In a deed to three children, a condition that the land should not be conveyed

until the youngest reached the age of twenty-five years, has been held good; and in the same case it was also held that the period of restraint would not be reduced to the attainment of twenty-one years, because at the time the deed was made the legal time of majority was twenty-five years, the land being then under the dominion of the Spanish law, and was afterwards reduced to twenty-one by coming under the laws of Missouri, *Dougal v. Fryer*, 3 Mo. 40. In *Tobey v. Moore*, 130 Mass. 448, the Supreme Judicial Court of Massachusetts declared that the rule against perpetuities which governs limitations over to third persons to take effect in the future, had never been held applicable to conditions, a right of entry for the breach of which was reserved to the grantor or devisor and his heirs as the condition, might be released by him or them at any time. See also *French v. Old South Society*, 106 Id. 479.

Some very respectable authorities, however, deny the right to restrain alienation at all. In *Mandlebaum v. McDonell*, 29 Mich. 78, the Supreme Court of Michigan, after reviewing the authorities, thus expressed its view of the law: "The only safe rule of decision is to hold, as I understand the common law for ages to have been, that a condition or restriction which would suspend all power of alienation for a single day is inconsistent with the estate granted, unreasonable and void;" and in the course of the opinion of the Court, CHRISTIANCY, J., after adverting to the maxims, *Conventio privatorum non potest publico juri derogare*, and *Fortior et potentior est dispositio legis quam hominis*, said: "In reference to real estate, the application of the maxim, *Modus et conventio vincunt legem*, is by the other two maxims above cited confined to a much narrower range. Here, for the sake of certainty and stability, the law has classed and defined all the various interests and estates in lands which it recognizes the right of any individual to hold or create, and the definition of each is made from, and the estate known and recognized by, the combination of certain legal incidents, many of which are so essential to the particular species of estate that they cannot, by the parties creating it, be severed from it, as this would be to create a new and mongrel estate unknown to the law and productive of confusion and uncertainty." This decision has been approved by the Supreme Court of Iowa in *McCleary v. Ellis*, 20 Am. L. R., N. S. 180. It is, however, safe to say, in spite of these dissents, that the law generally received is as we have stated above.

A condition that the grantee shall not alien to a particular person is good, according to Littleton. "But if the condition be such that the feoffee shall not alien to such a one, naming his name, or to any of his heirs or of the issues of such a one let, or the like, which conditions do not take away all power of alienation from the feoffee, etc., then such condition is good." Sect.

361, 223 a; and see *Langdon v. Ingram's Exr.*, 28 Ind. 368, and *Doct. & Stud.*, Dial. I., ch. 24.

A condition in a grant to tenants in common that partition should not be made has been upheld as a good condition, *Hunt v. Wright*, 47 N. H. 396.

Another form of condition, once common in New York, has been declared void as in illegal restraint of alienation, viz., where a conveyance in fee has been made, reserving a sum to be paid to the grantor upon any subsequent alienation by a grantee, with the right of re-entry or non-payment thereof. It was at one time thought that this condition had the sanction of a decision in its favor, but in *Jackson v. Schutz*, 18 Johns 174, which was cited to that effect, the condition in question was mentioned by but one judge, PLATT, J., in his opinion, the other judges basing the decision of the case upon another ground and not touching upon the validity or invalidity of the condition. The question, however, came up squarely in *De Peyster v. Michael*, 6 N. Y. 467. This was the case of a fee lease, which the Court declared to be a fee-simple estate, granted on two conditions: First. That the grantor in case of any future sale by the grantee should have the right of pre-emption. Second. That on a sale by the grantee, one-fourth of the price received should be paid to the grantor. The Court held the latter condition void as an illegal restraint upon alienation. RUGGLES, C. J., in the opinion of the Court, said: "If the continuance of the estate can be made to depend on the payment of one-tenth, one-sixth, one-fourth part of the value of the land, it may be made to depend on the payment of nine-tenths or the whole of the sale-money. It is impossible on any known principle to say that a condition to pay a quarter of the sale-money is valid, and a condition to pay the half or any greater portion would be void. If we affirm the validity of a condition to pay a quarter, we must affirm a condition to pay any greater amount. It would be a bold assertion to say that the adoption of such a principle would not operate as a fatal restraint upon alienation. That which cannot be done by direct prohibition cannot be done indirectly. The enforcement of the restriction upon alienation, by requiring money to be paid for the privilege and by a forfeiture in case of non-payment, separates the incident of free alienation from the estate in fee as effectually as a direct prohibition."

The rules and restrictions upon conditions above noted, however, do not apply to grants made by the government, which, in granting lands of the public domain, may absolutely prohibit their transfer without the consent of itself, as in *Farrington v. Wilson*, 29 Wisc. 383, a condition in a patent that the land should not be sold without the permission of the President of the United States, was held good; in deciding the case the Court relied on *Gibson v. Chouteau*, 13 Wall. 92, in which the Supreme Court of

the United States held that, "with respect to the public domain, the Constitution vests in Congress the power of disposition and of making all needful rules and regulations. That power is subject to no limitations. Congress has the absolute right to prescribe the times, the conditions, and the mode of transferring the property or any part of it, and to designate the person to whom the transfer shall be made."

Conditions which limit the use or the purpose or manner of use of land may be sustained. Conditions of this class are more frequently called restrictions, and are quite common, especially in cities. Of course a condition which amounted in its effect to depriving the grantee of the profits of his land, would be held void, but limitations and restrictions have been upheld with considerable liberality by the courts; amongst others, the following conditions have been held good: That the premises granted shall not be used for a tavern, *Post v. Weil*, 15 N. Y. S. C. 418; that liquor shall not be manufactured, sold, or otherwise disposed of on the premises, *O'Brien v. Wetherell*, 14 Kan. 616; *Cowell v. Colorado Springs Co.*, 3 Col. 82; S. C. 100 U. S. 55; *Collins Manufacturing Co. v. Marcy*, 25 Conn. 242; *Plumb v. Tubbs*, 41 N. Y. 442; that the land shall not be conveyed for any purpose but that of a school-house, *McKissick v. Pickle*, 16 Pa. St. 140; that no building of greater than a specified height shall be erected upon the premises, *Clark v. Martin*, 49 Pa. St. 289; that no building except of a certain kind shall be erected on the premises, and shall not be occupied for the purposes of an offensive business, *Dorr v. Harrahan*, 101 Mass. 531; *Parker v. Nightingale*, 6 Allen 341; *Gillis v. Bailey*, 21 N. H. 149; that no bay-window be built in a house, *Linzee v. Mixer*, 101 Mass. 512; that buildings shall not be erected which would interrupt the view from certain other properties, *Gibert v. Peteler*, 38 N. Y. 165; *Fuller v. Arms*, 45 Vt. 400. These restrictions will be binding on the subsequent purchasers of the land, and will be enforced in favor of those aggrieved by their violation and for whose benefit they were originally made, even if the grantor or his heirs should refuse to enforce the condition in the usual way, and there be no privity between the aggrieved persons and the aggressors, restrictions standing in this respect on a different basis from other conditions as will be noticed more fully hereafter. And it is also held that there may be a valid restriction, although it is provided in the deed that a violation thereof shall not work a forfeiture, as in *Tobey v. Moore*, 130 Mass. 448, where it was provided that an erection made, or business carried on in violation of certain "restrictions and conditions," should not work a forfeiture of the estate, but vest a right of entry in the grantor or his heirs to abate the nuisance. With regard to what restrictions or limitations in use would be permitted to stand, the words of PARKER, C. J., in

Gray v. Blanchard, 8 Pick. 284, are well in point: "A condition in a deed of a house that there should be no windows in it or no passage in or out, or that the grantee should never occupy or sell it, would come within the rule, and be void; but that there should be no door or window on one side or end, that it should not be sold for several years, or to a particular person, would fall within the exceptions to the rule, and form a valid condition."

Following the idea suggested, it may be said that a mere capricious restraint on use will not be sustained. Thus in *Mitchell v. Leavitt*, 30 Conn. 587, where a condition prohibited the erection of any saw- or grist-mill, and it did not appear that the restriction was for the benefit of the grantor or of any piece of property, the restriction was declared of no effect and void, as against public policy.

In *Newkerk v. Newkerk*, 2 Caines 345, a condition that the devisees should continue to inhabit the town of H., a small country town, was held void as repugnant to the estate granted and as absurd. LIVINGSTON, J., said: "It is repugnant to the estate granted. If the devisees were always to inhabit the town of H., they could not sell. If they did, were the grantees also to be inhabitants of the same town? Or were the devisees themselves, even after alienation, to remain there? If continuing there only while they held the estate were sufficient, they might defeat the testator's intention by parting with the land as soon as that situation became irksome to them, unless their assignees were forever to live in that town, which would not only be a great clog on its alienation, but would be entailing a very unusual condition on the owners of this property, and one that was to have no end, which the testator had no right to do. If there be no contradiction between the devise and the condition or unnecessary restraint on the devisee, it is too absurd and unreasonable to be countenanced. It is absurd for any man to compel all his children to live in a small country village as the condition of enjoying a piece of woodland lying there."

In the very recent case of *Hamond v. Port Royal and Augusta Railway Co.*, 15 S. Carolina 10, 12 Reporter 666, a new ground of avoiding a condition was attempted. The railroad company, which had a right to enter upon the plaintiff's land and condemn it for railway purposes, by virtue of an act of legislature, did not do so, but bought the land from the plaintiff, taking a deed therefor, "upon the express condition" that a certain system of drainage then in operation on the land should be kept up by the company; having failed to do so, in response to an action by the plaintiff to recover the land for breach of condition, it was contended by the company that the condition was avoided by public policy, it being contrary thereto to allow a corporation, chartered for the public good, and which could

have condemned the land by legal process, to be subject to a condition which would impair its freedom of action, but the Court said: "We do not think that considerations of public policy can enter into this case. The Port Royal company had the right, under the act of the General Assembly, to condemn this strip of land, and take possession by virtue of the mode therein prescribed. If it saw proper to resort to a private agreement and purchase, we do not see that it can interpose the public interest as a shield against their positive and distinct contracts, especially as the conditions imposed were reasonable and proper, and do not appear to have been surrounded with any great difficulty in being met and discharged."

In Michigan and Wisconsin, conditions "which are merely nominal and evince no intention of actual or substantial benefit to the party to whom or in whose favor they are to be performed," are practically prohibited, it being provided by statute in each State that such conditions "may be wholly disregarded, and a failure to perform the same shall in no case operate as a forfeiture of the lands conveyed subject thereto," Rev. St. Wisconsin, ch. xcv., § 2070, p. 617; 2 Comp. Laws Mich., ch. cxlvii., § 46, p. 1330. See *Barrie v. Smith*, 10 North-Western Reporter 168.

Character of Estate on Condition before Forfeiture.

An estate granted on condition, until it is forfeited for a breach thereof, differs in no respect from an estate absolute of the same extent, and may be used and enjoyed in precisely the same manner, except so far as the condition itself expressly curtails the free use and enjoyment of the land, *Chapman v. Pingree*, 67 Me. 198; *Taylor v. Sutton*, 15 Ga. 103; *Shattuck v. Hastings*, 99 Mass. 23.

Effect of Non-performance of Condition.

The effect of the non-performance of a condition precedent is to prevent the estate granted on such condition from ever vesting in the grantee, *Rollins v. Riley*, 44 N. H. 9; *Donohue v. McNichol*, 61 Pa. St. 73; and this is the case even if the performance be prevented by the act of God, *Mizell v. Burnett*, 4 Jones, N. C. Law 249.

The effect of the non-performance or breach of a condition subsequent, is to render the estate granted liable to forfeiture at the option of the person entitled to take advantage of such breach, *Stanley v. Colt*, 5 Wall. 119; unless the condition is one which the law will not enforce, in which case the estate will become vested absolutely in the grantee, *Barksdale v. Elam*, 30 Miss. 694; *Taylor v. Sutton*, 15 Ga. 103; *City of Philadelphia v. Girard's*

Heirs, 45 Pa. St. 9; *Reifsnnyder v. Hunter*, 19 Id. 41; *Walker v. Vincent*, Id. 369.

Performance.

Conditions subsequent, it has been repeatedly said, are not favored in law, and when relied on to work a forfeiture, must be strictly construed, *Merrifield v. Cobleigh*, 4 Cush. 178; *Hunt v. Beeson*, 18 Ind. 380; *Gadberry v. Sheppard*, 27 Miss. 203; *Bradstreet v. Clark*, 21 Pick. 389; *Hoyt v. Kimball*, 49 N. H. 327; *Page v. Palmer*, 48 Id. 385; *Laberee v. Carleton*, 53 Me. 211; the rule as laid down by SHAW, C. J., in *Rawson v. Inhabitants of School District No. 5*, 7 Allen 125, "Such a condition when relied on to work a forfeit is to be construed by the Court with great strictness, the demandant shall have his exact legal rights and no more." Examples of this strict rule of construction are quite numerous. In the *Michigan State Bank v. Hastings*, 1 Dougl. 228, where the bank had assigned its land and other property on condition that it should be indemnified against its debts, and a judgment was recorded on a mortgage upon the assigned land, it was held that there was no breach of condition before an action was brought on the bond accompanying the mortgage.

In *Emerson v. Simpson*, 43 N. H. 475, a deed was made on condition that the grantee keep up forever a certain fence, no mention was made of heirs, executors, or assigns of the grantee, and it was held that the condition was personal to the grantee, and expired with his life.

In *Voris v. Renshaw*, 49 Ill. 425, a condition not to assign except for a term of years prior to 1861, was held not to prohibit a lease for ninety-nine years being made previous to that date.

In *McKelway v. Seymour*, 29 N. J. Law 321, a condition that land should be used for a certain purpose, was held not to prohibit the use of some of it for another purpose, so long as the originally contemplated use was also kept up.

In *The Congregational Society of Halifax v. Stark*, 34 Vt. 243, the condition was that a certain congregational society should meet on the ground granted, or have a house there, and appropriate the same to a certain form of worship. This was held not to prohibit the society from removing and permitting another society to carry on the same species of worship on the granted premises.

In *Nowell v. Boston Academy of Notre Dame*, 130 Mass. 209, a condition that no building should be erected within ten feet of the street was held not violated by the erection within the said limit of a brick wall to be used as a fence.

In *Farrington v. Wilson*, 29 Wisc. 383, a condition that the grantee should

not convey without the consent of the President of the United States was held not to be binding on the heirs of the grantee, they not being mentioned in the condition in the patent.

The performance of a condition, its requirements being ascertained, must be in good faith and substantial, and it is sufficient if it be substantial rather than exact, *Sparulding v. Hallenbeck*, 39 Barb. 79; for example, where the condition is that buildings be used for a special purpose, a temporary use of them for another, and not improper one, not interfering with the specified use, has been held not to work a forfeiture—in other words, to make a breach in a condition of this kind there must be a permanent use and occupation for alien purposes. In *McKissick v. Pickle*, 16 Pa. St. 140, allowing a poor woman to occupy temporary quarters in a building, granted on condition that it should be used as a school and meeting-house only, was held not to work a forfeiture; and in *Broadway v. State*, 8 Blackf. 290, a similar condition was held not violated by the occasional use of the school-house for political meetings.

A condition that a certain institute should be permanently located upon the lands granted, before a certain date, was held by the Supreme Court of the United States fulfilled, by the passage, before the said date, by the governing body of the institute, locating it in accordance with the terms of the deed, followed by building on the same land after the date fixed; and that although the institute was afterwards burned and was reërected upon grounds other than those granted. MILLER J., in the course of the opinion of the Court, said, advertng to the condition, "Did this mean that all the buildings which the institution might ever need were to be built within that time, or did it mean that the officers were to determine in good faith the place where the buildings for its use should be erected? It is clear to us that the latter was the real meaning of the parties, and that when the trustees passed their resolution locating the buildings on the land, with the intention that it should be the permanent place of conducting the business of the corporation, they had permanently located the institute within the true construction of the contract." *Mead v. Ballard*, 7 Wall. 290. See, however, *Police Jury v. Reeves*, 6 Mart. N. S. 221; *Indianapolis, Peru, and Chicago R. W. Co. v. Hood*, 66 Ind. 580.

In *Southard v. Central Railroad Co. of New Jersey*, 2 Dutch. 13, there was a grant on condition that the grantee should use the demised lands as a depot, that it should not establish any other depot within a mile, and not erect or suffer the erection of any public house or any other house, except such as might be necessary for the sole use and accommodation of the grantee. The depot-master, with the knowledge and permission of the company, opened an oyster-stand, and in the course of five years lodged a few

people, and the company allowed the merchants of the town to take their freight from the cars at their own doors, instead of compelling them to come to the depot for it. It was held that the condition had been substantially complied with, and that there was no forfeiture. A condition that the land granted shall be used for a tanyard, without any time of such use being named, is held fulfilled by user as a tanyard for twenty-four years, *Hunt v. Beeson*, 18 Ind. 380. Where a tenant in common devised his interest to his co-tenant on condition that he should convey to the testator's daughter a certain portion of the land, the condition was held fulfilled when the devisee entered on the premises and set apart to the daughter her portion, which she entered upon and enjoyed, although no formal conveyance was made to her, *Plummer v. Neile*, 6 W. & S. 91. In a devise to J. B. "provided that if he do not return from his present voyage, or in case he does not return to Philadelphia within a reasonable time after my decease, but departs this life without lawful issue," the estate should go over, the condition was held fulfilled by a return of J. B. during the lifetime of the testatrix, *McCarthy v. Dawson*, 1 Whart. 4. Where a deed was made to the Methodist Protestant Church of land "for church purposes," with a condition that if any seats in the church building were rented or sold, the land should revert, and the land was afterwards sold to pay the debts of the church corporation, it was held that the mere sale worked no forfeiture, but that so long as the land was used for church purposes and no seats were rented or sold the title was good, *Woodworth v. Payne*, 74 N. Y. 196; but where the conveyance was on condition that the land conveyed should be applied to the support of such ministers as might preach in a certain meeting-house built upon the land granted, and in others erected on its site, and to no other purpose whatever; and the grantees took down the house and built another on another lot and voted that the granted lot should "be reserved for the erection of a meeting-house at some period hereafter when said parish may deem it expedient." It was held that there was in the vote sufficient evidence of an intention not to apply the subject of the grant in accordance with the condition, to work a forfeiture upon the carrying into effect of the resolution, *Austin v. Cambridgeport Parish*, 21 Pick. 215.

Where there was a condition against the sale of liquor upon the granted premises, and a tenant of the grantee without his authorization sold liquor thereon, it was held that the grantee was not chargeable with a breach in the absence of any proof of negligence on his part, *Collins Manufacturing Co. v. Marcy*, 25 Conn. 242.

A condition that a house shall be kept in good repair is broken when, the house having been burned down, the grantee or devisee fails to rebuild the same, *Tilden v. Tilden*, 13 Gray 103.

Where a deed was made conditioned upon the building of a church upon the premises and the laying out of a burying-ground upon the same, and the church was built elsewhere and the premises granted were kept for the burying-ground, it was held that a forfeiture had been incurred, *Dolan v. Mayor and Council of Baltimore*, 4 Gill 394.

A condition not to claim a debt, or against an estate, is broken by the mere claim itself, even if nothing be recovered thereby, *Frederick v. Gray*, 10 S. & R. 183.

The performance of a condition must, in general, be by the grantee or his heirs, or by one interested in having the condition performed, *Frederick v. Gray*, *supra*; *Wilson v. Wilson*, 38 Me. 18. Some conditions are, however, of a personal character, and their performance must be by the grantee himself unless by the permission of the grantor or his heirs, another is allowed to perform them. Support is generally considered one of these personal conditions, *Rollins v. Riley*, 44 N. H. 9; *Barker v. Cobb*, 36 Id. 344, though it has been held that, in the case of a condition for support of persons other than the grantor, the grantee was not bound personally to oversee the affording of support to those entitled thereto, but might delegate that duty to others, *Wilson v. Wilson*, *supra*. The grantee or devisee subject to a condition for the support of persons, cannot require the person to confine his or her right to support to a right receivable only on the premises demised or granted; but the support may be demanded at any reasonable place, *Wilder v. Whittemore*, 15 Mass. 262; *Thayer v. Richards*, 19 Pick. 398; *Pettee v. Case*, 2 Allen 546.

Performance of a condition will not be excused on account of the fact that the person who is to perform it is a feme covert, *Garrett v. Scouten*, 3 Denio 334; *Barker v. Cobb*, *supra*; or a minor, *Cross v. Carson*, 8 Blackf. 138.

Time of Performance.

As to the time of performance of a condition, the authorities do not all announce the same doctrine. In *Finlay v. King's Lessee*, 3 Pet. 346, MARSHALL, C. J., stated the law to be as follows: "It is also a general rule that, if an estate be given on a condition, for the performance of which no time is limited, the devisee has his life for performance." The true rule, however, with its exceptions, seems to be better stated by GIBSON, J., in *Hamilton v. Elliott*, 5 S. & R. 375, as follows: "It is an undoubted general rule that, where the condition is to be performed to the feoffor himself, and there is no limitation as to time, but only as to person, the feoffee has his whole lifetime to perform it. The reason is that, conditions not favored by the law, are taken strictly, and a literal compliance with their terms is all that

is required. But to this there are exceptions, in which, from the reason and nature of the thing, the condition shall be performed according not merely to the letter of the agreement, but according to its spirit and the true intent and meaning of the parties. . . . From a view of all the cases the rule seems to be that where a prompt performance of the condition is necessary to give the feoffor the whole benefit, contemplated to be secured to him, or where its immediate fruition formed his motive for entering into the agreement, the feoffee shall not have his lifetime, but only a reasonable time."

In *Hayden v. Stoughton*, 5 Pick. 528, PUTNAM, J., regarded what may be called the reasonable-time rule as the general one; he said: "Where no particular time is mentioned for the performance of a condition subsequent, the law requires that it be done in a reasonable time." See also *Ross v. Tremain*, 2 Metc. 495; *Allen v. Howe*, 105 Mass. 241; *Fisk v. Chandler*, 30 Me. 82; *Rowell v. Jewett*, 69 Me. 293. In *Adams v. Ore Knob Copper Co.*, 12 Reporter 166, where a grant of the "mineral and metallic interest" in certain lands was made upon a condition to be performed by the grantees "at their own convenience and time," and no present benefit accrued to the grantors, the United States Circuit Court for North Carolina, Western District, held that the condition must be performed within a reasonable time. It is thought that the rule laid down by GIBSON, J., would probably be that followed by most courts. The rule, as baldly stated in *Finlay v. King's Lessee*, seems entirely too liberal to the devisee, and in that case, where the condition was the devisee should marry one of certain sisters, the allowance to him of his whole lifetime in which to get married would certainly have a decided tendency to defeat the desires of the testator.

By Whom Forfeiture is to be Taken Advantage of.

A forfeiture may be taken advantage of by the grantor and his heirs, *Van Rensselaer v. Ball*, 19 N. Y. 100; *Nicoll v. New York and Erie Railroad*, 2 Kernan 121; *Marwick v. Andrews*, 25 Me. 525; *Winn v. Cole's Heirs*, Walk. (Miss. Rep.) 119; and the heir need not be expressly named in the instrument creating the condition, to entitle him to take advantage of a breach thereof, occurring either in the lifetime of the grantor or after his death, *Jackson v. Topping*, 1 Wend. 388; *Warner v. Bennett*, 31 Conn. 468; *Thomas v. Record*, 47 Me. 500; and to have any effect upon the estate the condition must be taken advantage of by those to whom the right so to do belongs; and it may be stated as a general rule, that with the breach of a condition a stranger has nothing to do, and a court will not examine at his request, or in a collateral proceeding, the question whether a condition has been broken and a

forfeiture incurred, *Norris v. Milner*, 20 Ga. 563; *Fonda v. Sage*, 46 Barb. 109; *Schulenberg v. Harriman*, 21 Wall. 44; *Rector of King's Chapel v. Pelham*, 9 Mass. 501; *Board of Normal School District v. Trustees of First Baptist Church of Normal*, 63 Ill. 204; *Smith v. Brannan*, 13 Cal. 107; *Dewey v. Williams*, 40 N. H. 222. The case of *Dolan v. The Mayor and Council of Baltimore*, 4 Gill 394, seems, however, to violate this rule. In that case the condition in the deed had been broken, but the grantor had made no entry for the breach. The city of Baltimore took steps looking towards a sale of the graveyard, part of the premises granted, for unpaid municipal taxes for paving and grading the adjoining street. A bill was filed by the pastor and a lay member of the church, in behalf thereof, to restrain the city from selling the land. The Court held that the complainants had no status in court, the title of the church having been forfeited. This case seems decidedly opposed to the current of authority, and it is submitted that the sounder view of the law is that contained in the dissenting opinion of DORSEY, J., and not that taken by the majority of the Court, and the rule as above stated may be taken as universal, at least where there is no express reservation of a condition to any one else than the grantor or his heirs. Whether a condition can be reserved to any one else is perhaps a more doubtful question; it has been held that no such reservation can be made. See *Gray v. Blanchard*, 8 Pick. 284, but in *McKissick v. Pickle*, 16 Pa. St. 140, the Supreme Court of Pennsylvania held that a reservation could be made to the assignees of a grantor, and that a sheriff's vendee was such an assignee; and in *Hamilton v. Kneeland*, 1 Nev. 40, it was denied that the common law rule that a condition could not be reserved except to the grantor and his heirs was recognized in this country.

It is not necessary that the owner of a condition should have any beneficial interest in any other estate which may be affected usefully by the condition, *Gray v. Blanchard*, *supra*.

The right to take advantage of a condition cannot be conveyed so as to give the assignee a right to enforce it, but the conveyance will be so far effective that it will destroy the right of the grantor to enforce it, thus practically destroying the condition, *Ruch v. Rock Island*, 7 Otto 693; *People of Vermont v. Society for the Propagation of the Gospel*, 2 Paine 545; *Bangor v. Warren*, 34 Me. 324; *Warner v. Bennett*, 31 Conn. 468; *Underhill v. R. R.*, 20 Barb. 455; *Parsons v. Miller*, 15 Wend. 561; *Tinkham v. Erie R. R. Co.*, 393; *Rice v. Boston and Worcester R. R.*, 12 Allen 141; and the effect is not altered by the fact that the person to whom the conveyance was made is the same who could subsequently have claimed the condition as heir of the grantor, *Rice v. R. R.*, *supra*; nor, it seems, is the case different where the conveyance is by force of law, as one made under an insolvent act,

Stearns v. Harris, 8 Allen 597. A devisee of a condition cannot take advantage of it, *Southard v. Central R. R. of N. J.*, 2 Dutch. 13, except where a condition is rendered devisable by statute, *Southard v. Central R. R. of N. J.*, *supra*; *Austin v. Cambridgeport Parish*, 21 Pick. 215; *Clapp v. Stoughton*, 10 Id. 463.

Forfeiture and Entry.

To forfeit the estate granted for breach of condition, the breach must be taken advantage of by some positive act on the part of the person entitled to the condition, and herein consists the great distinction between a condition and a conditional limitation. In the latter case the estate being determined on the arrival of the period of limitation without any act, entry, or claim.

The usual way of taking advantage of a condition is by entry or some equivalent act, and the right of entry is part of a condition itself and need not be expressly reserved, *Thomas v. Record*, 47 Me. 500; *Osgood v. Abbott*, 58 Id. 73; *Gray v. Blanchard*, *supra*. Entry, or its equivalent claim, is regarded by many authorities as absolutely necessary for the divestiture of an estate on condition, *Chalker v. Chalker*, 1 Conn. 79; *Bowen v. Bowen*, 18 Id. 535; *Phelps v. Chesson*, 12 Ired. Law 194; *Stone v. Ellis*, 9 Cush. 95; *Guild v. Richards*, 16 Gray 309; *Lincoln v. Drummond*, 5 Mass. 321; *Hubbard v. Hubbard*, 97 Id. 188; ~~Fonda~~ *Fonda v. Sage*, 46 Barb. 109; *Sperry v. Sperry*, 8 N. H. 477; *Willard v. Henry*, 2 Id. 120; *Jewett v. Berry*, 20 Id. 36; *Williams v. Angell*, 7 R. I. 145; *Tallman v. Snow*, 58 Me. 73; *Throp v. Johnson*, 3 Ind. 343; *Boone v. Tipton*, 15 Id. 270; *Memphis and Charleston R. R. Co. v. Neighbors*, 51 Miss. 413; *Voris v. Renshaw*, 49 Ill. 425; *Board of Education v. Trustees of First Baptist Church*, 63 Id. 204. In Connecticut an action of disseizin has been held not a sufficient substitute for entry or claim, *Chalker v. Chalker*; and the Maine statute with regard to entry has been held not to dispense with entry where it was formerly necessary to revest an estate or to enforce a forfeiture, *Marwick v. Andrews*, 25 Me. 525. Actual entry, or, if it be impossible to make entry, continual claim is necessary in South Carolina, *Hamond v. Port Royal and Augusta R. R. Co.*, 15 S. Carolina 10, 12 Reporter 666.

Other authorities, however, have not regarded entry as necessary, and have held that an action is a sufficient substitute therefor. In *Cornelius v. Ivins*, 2 Dutch. 376, the Court quoted with approbation the words of Lord MANSFIELD, in *Goodright v. Cator*, Dougl. 485, "We look upon it as having been finally settled in 1703, by the opinion of all the judges upon deliberation and consideration of all the cases, that actual entry is only necessary to enforce a fine. . . . The reason of the thing is agreeable to the

practice, for it is absurd to tangle men's rights in nets of form without meaning, and ejectment being a mere creature of the court framed for the purpose of bringing the right to an examination, an actual entry can be of no service," and held that an ejectment could be brought for a breach of condition without actual entry being previously made.

The same view of the law was taken in New York as early as 1799, in *Jackson v. Cryster*, 1 Johns. Cas. 125, in which the Court said "there was formerly much contrariety in the cases on this subject; but it seems to be settled by repeated decisions for near a century that the confession of lease, entry, and ouster is sufficient to maintain an ejectment for condition broken, and that an actual entry is not necessary except to avoid a fine."

Actual entry is not necessary in Pennsylvania, *Sheaffer v. Sheaffer*, 37 Pa. St. 525; *Brown v. Bennett*, 75 Id. 423. In Massachusetts, as we have seen by the cases above cited, the rule was for a long time that entry was necessary, but since the adoption of the Revised Statutes, c. 101, § 48, actual entry is no longer necessary, and the bringing of an action is regarded as a sufficient substitute, *Austin v. Cambridgeport Parish*, 21 Pick. 215.

Where the grantor has already the possession of the premises granted on condition, either concurrently with the grantee or otherwise, an entry is not required, as it would be simply absurd for the grantor to go out of possession for mere sake of entering to reestablish it, *Lincoln and Kennebec Bank v. Drummond*, 5 Mass. 321; *Rollins v. Riley*, 44 N. H. 9; *Hamilton v. Elliott*, 17 S. & R. 375; *Adams v. Ore Knob Copper Co.*, 12 Reporter 166; but it has been held that where the grantor is in possession, he must, to take advantage of the forfeiture, announce that he holds for condition broken, or in some way give notice of the intent to insist upon forfeiture, *Willard v. Henry*, 2 N. H. 120; on the other hand it has been held that the grantor in possession at the time, and after a condition is broken, will be presumed to hold on that account, *Andrews v. Senter*, 32 Me. 394.

To make an entry effective to work a forfeiture for breach of condition, it must be shown to have been made for the purpose of enforcing the forfeiture, and an entry made for another purpose will not support an ejectment, although at the time of entry a condition had been broken, *Bowen v. Bowen*, 18 Conn. 535; *Stone v. Ellis*, 9 Cush. 95. An entry upon a wild, uncultivated lot in the name of a number of such lots situated in the same county, conveyed by one deed and subject to the same condition, will be good as to all, *Green v. Pettingill*, 47 N. H. 377; but a mere turning of cattle upon wild and unimproved land is not a sufficient entry, *Guild v. Richards*, 16 Gray 309. It is also held, that where the grantor and the

grantee have agreed as to what act shall constitute a reëntry, a compliance with such agreement is sufficient to divest the grantee's estate, *Swoll v. Oliver*, 61 Ga. 248.

As a general rule, where the condition is the prompt performance of a certain act, no request to perform it is necessary before the person entitled to the condition can enter or otherwise take advantage of a breach, *Whitton v. Whitton*, 38 N. H. 127; *Rowell v. Jewett*, 69 Me. 293; but where the condition is the payment of a rent charge, then in order to divest a freehold, a demand of the precise sum due, on the very day that it is due and on the most notorious part of the premises out of which the rent issues, must be made, *McCormick v. Connell*, 6 S. & R. 151. In New York the necessity for a demand has been abrogated by statute, and the bringing of an ejectment is a sufficient demand, *Hosford v. Bullard*, 39 N. Y. 147.

In view of the strictness with which conditions are interpreted, it has been held that where the deed provides for a reëntry on the *neglect or refusal* of the grantee to perform the condition, a demand must be made before the neglect or refusal of the grantee will be held to have occurred, *Merrifield v. Cobleigh*, 4 Cush. 178.

Manner of Enforcement of Forfeiture by the State.

Where the person entitled to the condition is the State, the method of enforcing a forfeiture for breach is not the same as in the case of a private person. The rule upon this branch of the subject is well stated by LEWIS, C. J., in *The People v. Brown*, 1 Caines 424, as follows: "First. That the State can acquire seizin or possession of lands for breach of condition by matter of record only.

"Second. That generally where entry is necessary in the case of a common person, an office is necessary to entitle the State.

"Third. Where entry and action are necessary to a common person, an office and *scire facias* are necessary to the State."

And in *Schulenberg v. Harriman*, 21 Wall. 44, FIELD, J., said: "In what manner the reserved right of the grantor for breach of condition must be asserted so as to restore the estate, depends on the character of the grant. If it be a private grant, that right must be asserted by entry or its equivalent. If the grant be a public one, it must be asserted by judicial proceedings, the equivalent of an inquest of office at common law, finding the fact of forfeiture and adjudging the restoration of the estate on that ground, or there must be some legislative assertion of the ownership of the property for breach of the condition, such as an act directing the possession and application of the property, or that it be offered for sale or settlement.

Excuse or Waiver of Condition.

The performance of a condition may be excused, or after breach thereof the forfeiture of the estate may be waived; and where the condition itself is waived, whether before or after breach, a subsequent breach cannot be taken advantage of, *Dickey v. McCullough*, 2 W. & S. 88; *Barrie v. Smith*, Supreme Court of Michigan, 10 North-Western Reporter 168; S. C. 12 Reporter 187; it is otherwise where the waiver is merely of the right to take advantage of some particular breach.

The condition before breach may be excused not only by the grantor or his heirs, but also by the person towards whom it is to be performed, and in that case the condition is discharged, *Jones v. Bramblet*, 1 Scam. 276; as where the condition was to support the grantor and his wife, and after the grantor's death the wife released the condition, it was held as good discharge thereof, *Tanner v. Van Bibber*, 2 Duv. 550. A refusal by the person beneficially entitled to the performance of a condition to receive the same, will be a release, *Petro v. Cassidy*, 13 Ind. 289; *Boone v. Tipton*, 15 Id. 270.

A waiver of a condition may be by acts as well as by express words, *Andrews v. Senter*, 32 Me. 394; *Sharon Iron Co. v. City of Erie*, 41 Pa. St. 342; but no mere parole assent or passive acquiescence can destroy the effect of a condition contained in a deed at least prior to a breach, *Jackson v. Chrysler*, 1 Johns. Cas. 125; though silence, where it is coupled with standing by and allowing acts to be done and expense to be incurred by others which but for the presumed assent they would not have done or have incurred, may have the effect of a waiver, *Hooper v. Cummings*, 45 Me. 359. In *Barrie v. Smith*, 10 North-Western Reporter 168, the condition was that no intoxicating liquor should be sold on the premises conveyed. The grantee sold liquor thereupon with the knowledge of the grantors, or of some of them, and then sold the land to the defendant, who entered and made valuable improvements for the purpose of carrying on the liquor trade. The grantors then attempted to enforce the forfeiture. It was held that they had, by their inaction during the sale of liquor by the previous owner, and by permitting the defendant to make the improvements, waived the condition. Mere indulgence will not be construed as a waiver, especially where the accompanying words or deeds of the grantor show that it was not intended as such, as where the condition in a deed was that no building of a height greater than ten feet should be erected on the premises conveyed, and the grantor allowed the grantee to erect one eleven feet high, but with the express understanding and agreement that the condition should not be considered impaired or discharged, it was held that the condition

remained in force, *Clark v. Martin*, 49 Pa. St. 289. Where the grantor by his own acts prevents or renders impossible the performance of a condition he cannot take advantage of a breach, *Jones v. Walker*, 13 B. Mon. 163; *Lamb v. Miller*, 18 Pa. 448; *Jones v. Chesapeake and Ohio R. R. Co.*, 14 W. Va. 514.

Where a condition is released in part, the whole condition is gone, *Dakin v. Williams*, 17 Wend. 447, but a covenant coupled with the condition will not be destroyed thereby, *Id.*; *Stuyvesant v. Mayor of New York*, 11 Paige, c. 414, and this rule is only applied where it is sought to enforce a forfeiture, *Clark v. Martin*, *supra*.

After breach, a waiver may be implied from acts upon the part of the grantor treating the condition as still in force, *Hubbard v. Hubbard*, 97 Mass. 188, as where the condition was for support, continuing to receive the support, or by recognizing its continuance even by providing for the substitution of one act for another, as in *Sharon Iron Co. v. City of Erie*, 41 Pa. St. 342. In that case the condition reserved by the city of Erie, the grantor, was that the grantee should, within a time specified, erect a substantial bloomery; after the time had expired, the grantor, by a resolution, extended the time for performance of the condition, and allowed the substitution of a blast furnace for the bloomery; the furnace was never erected; the grantee failed and the property was sold to others, it was held that there could be no forfeiture for the breach.

If the acts relied on as showing a waiver can be referred to any other motive or cause of action, the grantor will not be held to have waived even the right to take advantage of a particular breach, as in *Frost v. Butler*, 7 Greenl. 225, where a farm granted on condition that the grantee should pay certain notes, manage the farm in a husbandlike manner, and deliver to the grantor a certain proportion of the produce thereof. The grantor entered for breach of condition, the breach assigned being the non-payment of one of the notes and the mismanagement of the farm, and brought ejectment. Before the action and after the breach he continued to receive from the grantee the stipulated proportions of the produce. It was held that from such receipt no waiver could be inferred, since the grantor would have the right, as owner of the land, to receive the produce; and see *Rowell v. Jewett*, 69 Me. 293.

A waiver after breach is not necessarily a waiver of the condition, but may be confined to a waiver of the right of entry for the particular breach which has occurred. In *Gillis v. Bailey*, 21 N. H. 149, the condition was violated by the erection of a certain kind of house; the grantor gave notice to the grantee to remove the same; nothing more was done until five years afterwards, when a fresh notice to remove was given, it was held that

the right of entry still remained in the grantor, and that he, by his inaction after the first notice, had waived nothing but the right to enforce the condition without giving additional notice to the grantee.

In order to make the receipt of rent after breach a waiver of the forfeiture, the rent must have accrued as well as have been received after the breach, for the principle, of course, is that by the receipt the grantor affirms the estate, out of which the rent issues, to be still in existence, but this affirmation can only relate to the time at which the rent fell due, for if it fell due before the breach of condition, it would have become a debt due at a time when no question as to a forfeiture had arisen, and the grantor would have had a right to receive it then, irrespective of any action he might take with reference to any breach of condition subsequently occurring, *Jackson v. Allen*, 3 Cow. 220; *Hunter v. Osterhoud*, 11 Barb. 33. See also *Jackson v. Sheldon*, 5 Cow. 448; *Bleecker v. Smith*, 13 Wend. 530.

Where a condition subsequently to its creation becomes impossible it is discharged, *Martin v. Ballou*, 13 Barb. 119.

Where by a change in the law or in the statutes of the government, the reason for a condition annexed by the government to an estate created by it, ceases, the condition falls; as where the colonization laws of Texas required a payment of a certain sum towards the building of churches, as a condition of the estate of a grantee from government, after the revolution of 1836, and the consequent severance of church and State, the land was held to be discharged of the condition, *Wheeler v. Moody*, 9 Texas 372.

A breach of condition should be taken advantage of with reasonable promptness, and it is too late to take advantage of a breach when the condition has been performed, although the performance has been after the time limited therefor, *Wilson v. Guthrie*, 2 Grant 111.

Effect of Enforcement with Reference to Other Remedies.

By enforcing a forfeiture a grantor waives his right to an action for damages for breach of covenant accompanying the condition, *Underhill v. Saratoga and Washington R. R. Co.*, 20 Barb. 458; and as a general rule where one has chosen to protect himself by a condition, he must look to the remedy given by it alone for the enforcement of performance thereof, for a court of equity will not compel the fulfilment of that in a deed, the non-performance of which works a forfeiture, as said by the Chancellor in *Woodruff v. Water Power Co.*, 2 Stockt. (10 N. J. Eq.) 489: "The grantor has fixed his remedy and can forfeit the estate at his pleasure." See also *Beck v. Montgomery*, 7 How. (Miss.) 39. The case of *Spofforth v. Manning*, 6 Paige, seems, at first sight, to contravene the above rule, but an examination of the facts will show that it was an exceptional case, and that without

equitable interference there would have been a failure of justice and a hardship suffered without any public interest being subserved thereby. In that case there was a devise to two children of the testator on condition that they should confirm a certain deed by which the testator had conveyed certain land which he held for life, the remainder being vested in the said children. The children entered on the demised premises, and the court decreed that they should execute a release to their father's grantee.

Equity will never assist in enforcing a forfeiture, *Warner v. Bennett*, 31 Conn. 468; *Spaulding v. Hallenbeck*, 39 Barb. 79; *Livingston v. Tompkins*, 4 Johns. C. 415; *Livingston v. Stickles*, 8 Paige 398.

The rule that equity will not interfere to compel performance where a condition has been created, does not apply in the case of those peculiar conditions known as restrictions, for there very frequently a court of equity will enforce a condition even if the grantor and his heirs are not parties to the proceedings, where its power is invoked by those for whose benefit the restriction was made. The reason of this is well stated in *Packer v. Nightingale*, 6 Allen 341, by BIGELOW, C. J.: "A purchaser of land, with notice of a right or interest in it, existing by agreement with his vendor, is bound to do that which his grantor had agreed to perform, because it would be unconscionable and inequitable for him to violate or disregard the valid agreements of the vendor in regard to the estate of which he had notice when he became the purchaser. In such cases it is true the aggrieved party can often have no remedy at law. There may be no privity of contract between himself and those who attempt to appropriate property in contravention of the use or enjoyment impressed upon it by the agreement of their grantor, and with notice of which they took the estate from him. But it is none the less contrary to right that those to whom the estate comes with notice of the right of another respecting it should wilfully disregard them, and, in the absence of any remedy at law, the stronger is the necessity of affording in such cases equitable relief, if it can be given consistently with public policy and without violating any absolute rule of law." See also *Gibert v. Peteler*, 38 N. Y. 165; *Dorr v. Harrahan*, 101 Mass. 531; *Clark v. Martin*, 49 Pa. St. 289; *Tobey v. Moore*, 130 Mass. 438; *Sanborn v. Rice*, 127 Id. 387.

Relief against Forfeiture.

While the rule is inflexible that equity will not interfere to assist a forfeiture, it will often interpose and relieve against one, where there has been no wilful default on the part of the grantee, and where the injury suffered by the grantor, or by whomsoever is entitled to the condition, is compensable in damages or otherwise. This relief is most frequently afforded where

the breach is the non-payment of a sum of money at a time named, *Sanborn v. Woodman*, 5 Cush. 36; *Hancock v. Carlton*, 6 Gray 39; *Carpenter v. Westcott*, 4 R. I. 225; *Rogan v. Walker*, 1 Wisc. 527. Relief has also been afforded where the condition was that the grantee should afford maintenance and support, and a breach had been accidentally made, irreparable damage not having been occasioned thereby, *Henry v. Trupper*, 29 Vt. 358.

The Estate of the Grantor after Reëntry.

A question has sometimes been made as to what estate the grantor after reëntry for forfeiture is possessed of; and the better opinion seems to be that he is seized as of his original estate. It is true that this position is denied by RUGGLES, C. J., in the course of his interesting and instructive opinion in *De Peyster v. Michael*, 6 N. Y. 467; speaking of the right of reëntry, the learned judge says: "It is not a reversion, nor is it the possibility of a reversion, nor is it any estate in the land. It is a mere right or chose in action, and if enforced the grantor would be in by the forfeiture of a condition and not by reverter."

The current of authority is, however, the other way. Coke, 202 a, says: "Regularly it is true that he that entereth for a condition broken shall be seized in his first estate or of that estate which he had at the time of the estate made upon condition," and states certain exceptions to the rule on account of impossibility, as where the reverter is to one seized in right of a wife who has died before breach—of necessity, as where a cestui que use prior to the statute of uses had made a feoffment and had entered for condition broken—or with regard to certain collateral qualities. This is recognized as the law on this side of the Atlantic in *The Proprietors of the Church in Brattle Street v. Grant*, 3 Gray 142. BIGELOW, J., said: "A grant of a fee on condition only creates an estate of a base or determinable nature in the grantee, leaving the right or possibility of reverter vested in the grantor." See also *Hershman v. Hershman*, 63 Ind. 451; *Scott v. Stipe*, 12 Id. 74.

It follows from the above position that any lien upon or right obtained by a third party in an estate held subject to a condition will be destroyed upon a reëntry by the grantor for a breach of condition, *Moore v. Pitts*, 53 N. Y. 85; and a grantor is under no obligation to regard any supposed rights which a creditor of the grantee has acquired in the conditional estate. Thus in a case where, in April, 1857, a creditor of the grantee of an estate on condition made a levy on the estate, and in May of the same year the grantor formally entered for condition broken, and in 1859 took actual possession of the premises, it was held that there being no evidence of collusion between the grantor and grantee, the creditor acquired no right as against the former, *Thomas v. Record*, 47 Me. 500.

Conditional Limitations.

DEN EX DEM. ANN SMITH, HILL SMITH AND THOMAS SMITH *v.* JOHN HANCE AND ISRAEL HANCE.

Supreme Court of New Jersey, February Term, 1830.

[Reported in 6 Halsted 244.]

Ann Smith devised to John Smith a plantation and tract of woodland, during his natural life, and after his death, to such of the lawful issue of the body of the said John Smith, as should arrive to the age of twenty-one years, and to the survivor of such issue; provided that the said John Smith should convey, by a good and sufficient conveyance in law, unto Israel Smith, the son of Hill Smith, all the right and title of him the said John Smith, to the real estate of his father, Hill Smith; and provided also, that the said John Smith should release to her executors all accounts, charges and actions against her or her executors; and should release also all actions against the said Israel Smith above named; and in case the said John Smith should refuse to make such conveyance to the said Israel Smith, or to execute such releases to her executors and to the said Israel Smith, then this devise to be void, and in that case she devised the said plantation and tract of woodland to the said Israel Smith and the heirs of his body. John Smith died in the lifetime of the testatrix, leaving three children all under age, and without making any conveyance to Israel, of the real estate of his father and without executing any release of his pecuniary demands against the testatrix and Israel Smith.

The condition of the devise to John, not having been performed, the devise to him and his issue failed, and the devise over to Israel was a good devise, and took effect.

Where words of condition are used in connection with a devise, and there is another or subsequent devise of the same premises, on failure of the first or preceding devise; the words of condition are not strictly considered as such, or rather have not the force and operation of words of condition, and are called words of limitation.

When a devise is made after a preceding executory or contingent limitation, or is limited to take effect, on a certain condition annexed to any preceding estate, if that preceding or contingent estate should never arise

or take effect, the remainder over will nevertheless take place, the first estate being considered only as a preceding limitation, and not as a preceding condition to give effect to a subsequent limitation.

R. Thompson, Jeffers and Wood, for the plaintiff; cited 1 Vez. 423; Cruise, Tit. 13, Ch. 2, Sec. 14, 15; *Peyton v. Berry*, 2 P. W. 626, 783; 2 Atk. 16; 3 Burr. 1624; 5 Mass. Rep. 526.

Dayton and Wall, for the defendants, cited Cruise, Tit. 13, Ch. 1, Sec. 15. Ibid. Tit. 16, Ch. 2, Sec. 29, 30. Ibid. Tit. 38, Ch. 20, Sec. 11, 17; Com. dig. devise N. 10; 1 Vez. 420; 2 Fearne 392, 453.

Opinion of CHIEF JUSTICE.

Ann Smith, late of the county of Salem, at the making of her will on the 17th of April, 1818, was the owner of a plantation in the township of Mannington in that county. She had then living a son, John Smith, and a grandson, Israel Smith, the son of her son Hill Smith, who had previously departed this life. Her son John Smith was then the owner of a farm in the township of Elsinborough, and had pecuniary demands against his mother and also against the said Israel Smith, his nephew. Ann Smith, by her will devised among other things as follows: "I give and devise unto my son John Smith, all that plantation situate in the said township of Mannington, on which the said John Smith now resides; and also, twenty-five acres of woodland situate in the said township, adjoining lands of Jediah Allen and Samuel Allen, during his natural life; and after his death I give and devise the said plantation and tract of woodland to such of the lawful issue of the body of the said John Smith, as shall arrive to the age of twenty-one years, and to the survivor of such issue; and for the want of such issue, I give and devise the said plantation and tract of woodland in fee to Joshua Smith, Powell Smith, and Mary Smith, wife of Merriman Smith, Esq. and to their heirs forever: Provided that the said John Smith shall convey, by a good and sufficient conveyance in law, unto Israel Smith the son of Hill Smith and my grandson, all the right and title of him the said John Smith, to the real estate of his father Hill Smith, and which was laid off to the said John Smith in the division of the real estate of his father, by order of the Orphans' Court of the county of Salem [being the above mentioned farm in Elsinborough,] and provided also, that the said John Smith shall release to my executors hereinafter

named, all accounts, charges and actions against me or my executors : and shall also release all actions against the said Israel Smith, above named ; and in case the said John Smith shall refuse to make such conveyance to the said Israel Smith, or to execute such releases to my executors, and to the said Israel Smith, then this devise to be void, and in that case I give and devise the said plantation and tract of woodland to the said Israel Smith and to the heirs of his body, and for want of such heirs, to the aforesaid Joshua Smith, Powell Smith and Mary Smith, wife of said Merriman Smith." The testatrix lived until 22d December, 1825. In the mean time, however, in May 1820, her son John died, leaving three children, the eldest of whom is yet under the age of twenty-one years. No conveyance was made by John in his lifetime to Israel, of the Elsinborough plantation ; nor was any release of the pecuniary demands executed ; but the plantation on the decease of John descended to and is now held by his children ; and after his decease, his administrator sued for and recovered those demands from Ann and Israel respectively. The contents of the will were unknown to John and to his children, during the life of the testatrix.

The children of John, who are the lessors of the plaintiff, insist the devise of the Mannington plantation has failed, not only as to John, but also as to Israel ; that the plantation has descended therefore, to the heirs of the testatrix ; and that in the character of heirs they are now entitled to recover one moiety of it from Israel, who was in possession at the commencement of this action. If such is the legal result, the intention of the testatrix is certainly frustrated ; for the slightest inspection of the will shows she did not design that John or his children should have payment of the pecuniary demands, and the farm in Elsinborough, and one-half the farm in Mannington ; nor that Israel should be compelled to pay the pecuniary demands against him, and be left with half only of the latter farm and without any portion of the former. On the contrary, her wish was that the pecuniary demands should be extinguished ; that John, and after him, his issue, should have the plantation in Mannington, and Israel, that in Elsinborough ; and if this disposition did not take effect, she intended that Israel and the heirs of his body should have the plantation in Mannington.

Our duty then is, to examine whether the intent of the testatrix according to the provisions of the will, and the events which have occurred, can, consistently with the rules of law, be accomplished. Upon looking

into the will we find a devise of the premises in question to John, and afterwards to his issue, and also a devise of the same premises to Israel and the heirs of his body. The devise to John was conditional, not absolute. The devise to Israel was to take effect in case the devise to John did not become absolute, or, in the language of the will, became void. The disposition intended in the devise to John, was first, if ever, to take effect; and if it did, and became absolute, the devise over to Israel could never come into existence. The devise to John, was conditional. The devise to Israel, however, was not connected with, or dependent upon that condition, except as it served to control the devise to John. The failure of performance of that condition while it would defeat the estate to John and the others connected therewith, that is, to his issue, and for want of such issue, to the three Smiths, would not defeat the estate to Israel. On the contrary, the non-performance of the condition, causing the failure of the devise to John, would give rise to the contingency on which the devise to Israel was to take effect. The condition was not connected with all the clauses of the will, so that a failure of performance should alike operate on and defeat all, but was connected with certain of the clauses, and a failure operating on and defeating them, would clear the way for the existence of the rest. The estate to the issue of John, and for the want of such issue, to the three Smiths, is, like the estate to John, dependent on the condition. The condition unfulfilled, the devise to the issue and to the three Smiths must fail as well as the devise to John. Suppose John living, and the correctness of this position is very manifest. His non-performance would defeat the estate to him and those immediately dependent on it, but not the devise to Israel, which indeed such non-performance was to call into action.

Such being the nature of the will, it remains to inquire what effect is produced by the events which have occurred. John Smith, the first named devisee, died in the lifetime of the testatrix. He made no conveyance or release. His children are under age. They can make no conveyance, even if a conveyance by them would be of any avail. The condition of the devise to John, has not been performed and cannot be performed. The devise to him and to his issue fails. And the question is, whether the devise over to Israel also fails or now takes effect? The intent of the testatrix, under such circumstances, cannot I think be mistaken. Her wish was, that John should have the Mannington

farm and Israel that in Elsinborough, and that the pecuniary demands should be released ; and it is equally clear and certain that she intended that neither the whole nor any part of the Mannington farm, should go to John or his issue, unless the conveyance of the other farm was made and the releases executed, unless the Elsinborough farm became the property of Israel and the pecuniary demands were extinguished ; and that she designed Israel to have the Mannington farm in case he did not obtain the other, and a discharge of the claims which John had against him.

In order to resolve the question proposed, let us in the first place, examine the nature of the estates created by this devise.

Where words of condition are used in connection with a devise, and there is another or subsequent devise of the same premises on the failure of the first or preceding devise, the words of condition are not strictly considered as such, or rather have not the force and operation of words of condition, and are called words of limitation. The design of this rule is to subserve the intent of the testator. For if they were, under such circumstances, considered words of condition strictly, the intent would be liable always to be defeated, if the second devisee was not the heir at law. By another rule, no person except the heir at law, can enter for or enforce, a breach of a condition. And by another rule, the estate, standing on condition, does not cease on the breach of the condition, but on the entry, or at sometimes the claim, of the heir at law. Hence if the words were deemed words of condition, the second devise might fail if the heir at law did not think proper to enforce the breach of the condition, and to enter or claim, and put an end to the estate. The condition might fail or be broken, and yet contrary to the intent of the testator, the subsequent devise, from the omission or refusal to act of the heir at law, might not take effect. Thus if a farm was devised to A. on condition that in one year he should build an house upon it, the heir at law only could enter for a failure ; and the estate of A., though no house were built would continue until he did enter. But if the land were given to B., not being the heir at law, in case the house was not built, the land, on failure to build, would at once vest in B. without any act to be done by the heir at law. In the one case, the words are called words of condition, and in the other, by reason of their connection, words of limitation ; and the estate, which in the one instance is called, an estate upon condition, is in the other called, an estate upon conditional limitation.

Thus in a case like the present, if the words annexed to the first devise are deemed words of condition, the second devise would depend not merely on the performance or failure of the condition, but on the will and pleasure of the heir at law, for if he did not think proper to enter, the second devise would not take effect. But as they are deemed words of limitation, the concurrence of the heir at law is not needed, and the estate, on breach or failure of the condition, at once vests in the devisee.

Carrying our view of the present case somewhat farther, we shall distinctly perceive the propriety of the rule which thus, under different circumstances, gives a different construction to even the same words; and how essential it is to secure, and how effectually it does secure, the intention of the testatrix. The conclusion is irresistible, as well from the very language as from the structure of the will, that she designed the Mannington farm should go to Israel in case John did not make the conveyance she wished of the Elsinborough farm. She did not intend he should have the liberty of choice to make or refuse the conveyance, and besides, if heir at law, to have the power to enforce or waive the breach of the condition; first to refuse to convey, and then to refuse to enter for want of conveyance. She intended the devise to Israel should vest on the refusal to convey, not on a subsequent act of John himself, taking advantage of or enforcing against himself the breach of the condition. Yet if these are words of condition only, John may refuse to convey, and then by refusing to enter, prevent the subsequent devise to Israel from taking effect; which result he can by no means produce, when the words are construed words of limitation; for then on his breach or non-performance of the condition, the estate vests in Israel, and he may enter.

Upon the argument at the bar, it was insisted that this devise cannot contain a conditional limitation, because the condition imposed upon John is in its nature precedent; he must, it was said, convey and release before the estate could vest, and a conditional limitation depends on a condition subsequent; a condition to defeat an estate once vested. I do not find this distinction recognized in the books; on the contrary, Burrow reports Lord Mansfield to have said, that the case of *Porter v. Fry*, 1 Ventr. 202, which will hereafter be more particularly stated, was a condition precedent, and therefore, the estate never vested; 4 Burr. 1938. And moreover, the reason on which the rule for construing words

of condition to be words of limitation, is founded, seems to apply with equal force to both kinds of condition. Such construction is made to prevent the heir, who alone can act under a strict condition, from defeating the devise over by refusal to enter or claim for breach or non-performance. Now, in both cases, the devise over would be equally defeated, if the heir refused to enter or claim. And hence the rule, formed in order to prevent such result in the one instance, ought also to be in force in the other. But it is not necessary to pursue this inquiry or to resolve it; for it will be seen hereafter, in a leading and unshaken case, that words of condition, like the present, have been construed to be words of limitation, and effect has been given to a devise over, though the condition was unperformed, because events rendered it impossible.

It was farther argued on the part of the defendant's counsel, that the right of choice to make or refuse the conveyance, was intended to be personally exercised by John; to be a personal consideration with him; in other words, that the disposition to be made of the farms was to depend on his preference and selection; and that as he died in the lifetime of the testatrix, and before he could be called to make the choice, the subsequent devise which was to depend on his refusal, is now impossible, and cannot take effect, and the Mannington farm must therefore descend to the heirs at law. This argument assumes for its basis, a confidence in John, or an intention in his favor, much beyond the language of the will. The testatrix designed to produce a certain disposition of the real estate, which she has mentioned; the Mannington farm to John, the Elsinborough farm to Israel. Such only was her real aim. This disposition could not indeed be brought about, unless John thought proper to make the conveyance. She could not deprive him of his right to refuse. But she meant to confer upon him no power or authority, to add nothing in this respect. The condition was framed and annexed to the devise, not for the benefit or gratification of John, but simply to produce the disposition which she desired.

This argument also assumes an undue influence to the phrase, "in case the said John Smith shall refuse." The term refuse, as here used, is explained by the context, is no more than a repetition of the condition, and is not designed to restrain or enlarge, or in any wise to alter it, and means only a failure to convey and release. In *Taylor v. Mason*, 9 Wheat. 344, Chief-Justice Marshall says the words "refusing to comply," may in general have the same operation in law as the words "fail-

ing to comply ;” and he lays down this rule of construction, “Where the condition to be performed depends on the will of the devisee, his failure to perform is equivalent to a refusal.”

But whatever opinion may be entertained of the design of the testatrix to vest in John a right of choice, it must be conceded that such intent was of a subordinate or secondary character, a particular intent, as it is sometimes denominated. The general or paramount intent was, that Israel should have the Mannington farm, if he did not obtain the other and a release or extinguishment of the claims against him.

The truth, however, is, and so it will appear in the sequel, that this argument, and the result of it, are of little importance, inasmuch as the effect of this devise, and the determination of the present controversy, do not turn upon the inquiry here raised. We are now brought to the consideration of one of the most important and influential topics in this cause. What is the legal consequence in case of such limitations by will, of the decease of the first devisee, or him by whom the condition was to have been performed, in the life of the testatrix? Do both devises, first and second, fail? Or does the first only fail, and the second take effect? In *Holcroft's case*, Moore 486, there was a devise to the use of the first son of Sir John Holcroft in tail, and so to the second, third, and fourth sons successively, and if the said fourth son should happen to die without issue, remainder over to Hamlet Holcroft, and divers limitations over. Sir John Holcroft never had but one son. The question was, whether the subsequent uses could arise? The court held that they could, for the words amount to no more than a limitation of the estate, and are not a condition precedent to the estate of Hamlet. In *Scatterwood v. Edge*, 1 Salk. 229, the devise was to trustees for a term of years, then to the first and other sons of A. successively in tail male, provided the said sons should take on them the surname of the devisor; and in case they or their heir or heirs should refuse to take his name or die without issue, then to the first son of B. in tail male, provided he took the surname. A. had no son at the time of the devise, and died without issue; B. had a son living, who took the name of the devisor. It was held that the devise to A. was not a condition precedent to the devise to B., which failing, all must fail, but a precedent estate attended with limitations, and that the devise to B. took effect.

In *Williams v. Fry*, 1 Vent. 199, Raymond 236, the testator devised an house to his wife for life, and after her death to his granddaughter,

the defendant, and the heirs of her body ; Provided always, and upon condition that she married, with the consent of certain named persons, and in case she married without such consent, or happened to die without issue, then to his grandchild, the lessor of the plaintiff, and his heirs forever. The granddaughter married at the age of fourteen years, without such consent, and without notice of the will, until after her marriage. The court held, that though the word condition was used, yet, limiting a remainder over, made it a limitation, for so it was plain the testator meant ; and that notice of the condition or will was not necessary ; and judgment was rendered for the plaintiff. In *Jones v. Westcomb*, Prec. Ch. 316, a testator devised to his wife for life, and after her death to the child of which she was then enceinte, and if the child died before it came to the age of twenty-one, then he devised one-third part to his wife, and the other two-thirds to other persons. The wife was not enceinte, and so the contingency on which the devise over was to take place, never happened. Yet it was held that the devise over was good. Lord Mansfield speaking of this case in 3 Burr, 1624, says, "the intent, though not expressed, must be construed to give the estate to the substitute, unless a posthumous child lived to be of age to dispose of it. Consequently, no posthumous child having ever existed, the substitute was entitled." In the case now before us, the intent is equally strong to give the Mannington plantation to the substitute, Israel, unless a conveyance and releases were made. Consequently, no conveyance or release being made, the substitute is entitled. *Andrew v. Fulham*, 2 Str. 1092, 1 Vez. 421, was an ejectment which depended on the same clause of the will on which arose the case in Chancery of *Jones v. Westcomb*. The Chief Justice said the objection was, that no such person ever existed, and, consequently, those who claim in remainder on the dying of such person under twenty-one, and without issue, can never enjoy the estate. But he said it was no unusual thing for words of condition to be taken as words of limitation, where there was a remainder over ; that it was an executory limitation, which are all on some contingency on the failure of a preceding limitation, and none of them takes in all the ways of failing, yet it was the same thing. The devise over was held good by the court. *Gulliver v. Witchett*, 1 Wils. 105, was on the same will. The court said, whether the limitation to the child never took effect, or whether it did and was determined, is the same thing ; as the remainder to the child never could take place, the next devise over must

take effect. In *Stratham v. Bell*, Cooper 40, the testator having a daughter, and supposing his wife enceinte, devised, if a son, to him at twenty-one years of age, and if a daughter one moiety to his wife, and the other to his two daughters at twenty-one; and if both died before that time, both their shares to his wife and her heirs. The testator died, his wife was not enceinte, and the daughter died under age, and without issue. The question was, if the wife should take the whole? On the part of the plaintiff, it was insisted, that the wife should not take but on the condition expressed in the will, the birth of a second daughter, and the death of both without issue, which condition was not performed, and therefore she could not be entitled. But the court held it was the plain intention of the testator that in case no son should be born, and he should have no daughters who should live to the age of twenty-one years, that the wife should have the whole estate and in the event which had happened, she was so entitled. In the case before us, it seems to be the plain intent of the testator, that if the farm in Elsinborough was not conveyed to Israel, and the pecuniary demands extinguished, he should have the farm in Mannington. The cases which thus far have been reviewed, are, from the principles established by them, important in the present inquiry. The case of *Avelyn v. Ward*, 1 Vez. sen. 420, is more directly in point. It was thus: Serjeant Urling devised his real estate to his brother Goddard Urling, and his heirs, on condition that within three months after his decease, he should execute and deliver to his trustee a general release of all demands. But if his brother should neglect to give such release, the said devise to him should be null and void; and in such case he devised the real estate to Richard Ward, his heirs and assigns. Goddard Urling, the first devisee, who was also the heir at law of the testator, died in his lifetime. The chancellor held that the devise over, and the contingency on which it was given, was to be considered a conditional limitation; that it was to be construed according to the sense and intention of the testator that if in any event the first could not take place, the subsequent should; and that the substance of this was the intent of the testator, that if no such release was executed whereby the demand against his estate would exist, the estate should go over. And he held that the land should not descend to the heir at law, but go to the devisee over. This case, in all its leading features, was like the case now before us. In both, the first named devisee was an heir at law. To both devises a condition was annexed,

requiring an act to be done by the devisee; in the one, the time within which the act should be done, was expressly limited to three months after the decease of the testator; in the other, although no express time is limited, yet some time after the decease is necessarily allowed, and the law will require that it should be of reasonable length; and as in both cases, after the decease of the testator, some time is requisite, the principle as to each must be the same. The devise to Goddard Urling was a fee-simple; the devise to John, with the others dependent on it, is equivalent. There was in each a devise over, and in both, the devisee died in the lifetime of the devisor. In delivering his opinion, the chancellor, Lord Hardwicke, said, he knew no case of a remainder or conditional limitation over of a real estate, whether by way of particular estate, so as to leave a proper remainder, or to defeat an absolute fee before, by a conditional limitation; but if the precedent limitation, by what means soever is out of the case, the subsequent limitation takes place.

The effect in the present instance, of the decease of John Smith, the first devisee, is very clearly shown in the general rules laid down by Fearne and by Preston, in their elaborate and distinguished works. I have thought it more satisfactory to recur to some of the leading cases, than to content myself with a reference to these elementary treatises. Fearne says: Where a devise is made after a preceding executory or contingent limitation, or is limited to take effect on a condition annexed to any preceding estate, if that preceding or contingent estate should never arise or take effect, the remainder over will nevertheless take place; the first estate being considered only as a preceding limitation, and not as a preceding condition to give effect to a subsequent limitation. Fearne Cont. Rem. 399. Preston says: The limitation over will be considered to give an estate to commence in possession as soon as the interest previously limited shall be removed, by either failing of effect or by taking effect and afterwards determining, as often as the intention calls for this construction, although the contingency which is expressed merely provides for the determination of the interest under the former gift. Prest. on Estates 87.

Upon the whole, I am of opinion, the devise over to Israel was a good devise, and took effect; and that on this special verdict, judgment should be rendered for the defendant.

Opinion of FORD, J.

This is a devise made to John Smith, who was the son of the testatrix, for the term of his natural life, upon condition that he conveys his estate at Elsinborough, to her grandson Israel Smith; and if he does not comply with the condition, the devise to him is to be void. This must necessarily be construed a precedent condition, to be performed on the part of John, before the estate devised can vest in him, otherwise he would hold both estates at the same time, contrary to the intent of the testatrix, who evidently meant, that he should take one estate in lieu of the other, but not both together. If he conveys the one estate to Israel, the other vests in him by the devise, *eo instanti*, and he never has both estates; but if the devised estate vests in him first, he will certainly have both, until he makes a conveyance of the other, be the time longer or shorter; whereas it is the plain intent of the will that he should never have *both* the estates for any length of time whatever, and therefore it is necessarily a condition precedent, to be performed before any estate can vest in John under this devise. I found this construction on the evident intent of the will, under that great rule so fully settled in the books, that a condition is to be construed precedent or subsequent, as the intent of the testator may require. Cruise, Tit. 13, Ch. 1, Sec. 10.

Taking it then to be a condition precedent, we are next to consider whether the condition is to be restricted to John's estate, or extend to that of the issue of his body likewise. If this were the devise of an estate of inheritance to John and the issue of his body, the issue would necessarily be affected by the condition, for if no estate vested in the ancestor, there would be none for the issue to inherit from him. But instead of being an estate tail to John, it is a strict estate for his life, and the issue are not to take as *heirs*, at his death, but the limitation after his death is made "to such of the lawful issue of his body as shall arrive to the age of twenty-one years;" that is, to certain persons, not by name, but by description, who shall take the estate after his death, on condition they arrive to the age of twenty-one years, which persons are not to take the estate by descent, but by purchase. But the condition affects the estate of the issue, clearly, as I apprehend, upon a different ground. If John does not convey to the grandson, the failure draws after it this consequence, that he is not only to lose the estate under the will, but the same is expressly limited over to the grandson,

and the issue of John are as necessarily precluded as if the testatrix had shut them out by express words. If the issue of John could take this estate, they would not only defeat this plain limitation in the will to the grandson, but he would obtain neither of the estates, when it is the most evident intent of the testatrix that if he could not have one he should have the other. It was not to be expected that John would give up the one estate, which he held in fee-simple, for a mere life estate in the other, unless she spread before him the additional motive of benefiting his issue; and therefore if he did not comply, she took the estate away from him and his issue, in the most direct manner possible, by a limitation of it over to her grandson. The will is so drawn as that the non-performance of the condition should defeat the estate otherwise intended for John's issue, as well as himself, by carrying the estate over to the grandson by an express limitation in case of failure; and therefore the condition is annexed to and affects the issue, as well as their father.

But John died by the act of God, in the lifetime of his mother, whereby the performance of the condition on his part became impossible, and it was argued, in the first place, that as the act of God works injury to no one, so it ought not to destroy the estate of John's infant and innocent issue; and secondly that if a condition become impossible, the non-performance of it is excused in law. But the act of God cannot properly be said to destroy the estate of the innocent issue if they had no estate vested in them, and that they had, is the point first to be made out. If the question is whether the act of God will *give* them this estate without its being given by the will, the question readily answers itself in the negative, for it is the will that must give the estate if any is to be given. The meaning of the maxim is no more than that, where the will has given an estate, the act of God will not take it away.

Then as to the performance of the condition being excusable in law, by its becoming impossible through the death of John, before his mother, the law is well settled that if an estate already vested in a person, is to cease unless he perform a certain act by a given time, and the act becomes impossible before the time arrives, it excuses the performance; so that the party shall not lose his estate. Such is a condition subsequent, for divesting an estate which the party has in him. But if it be a condition precedent to be performed in order to *acquire* an estate, the performance whereof becomes impossible by the act of God or otherwise, the party acquires no estate. The words of Co. Lit. 206 a. are these:

“And so it is in case of a feoffment in fee, with a condition *subsequent that is impossible*, the estate of the feoffee is absolute; but if a condition *precedent be impossible* no estate or interest shall grow thereon.” Now we have shown this to be a condition precedent, and the consequence of its not being performed is that neither John nor his issue acquired the estate.

We have thus far considered this a condition in law, in order to ascertain whether it affects the estate of the father only, or of him and his issue also; and likewise to determine whether it be a condition precedent or subsequent, and the consequences either way; which principles remain applicable to the case, although it should not be strictly a condition in law. And such it certainly cannot be. It is a settled rule of law that none but the *heir* can enter and take advantage for a condition broken. Cruise, Tit., Ch. 1, Sec. 17. Now the consequence of holding this to be a condition is, that if John had survived his mother, and actually refused to convey, he being an heir, must have entered on himself for his own default. Moreover, he would have profited by his own neglect, losing thereby merely an estate for life, but acquiring in lieu of it an estate in fee-simple in a moiety of the very lands, which by the intent of the will, he was never to touch, unless he conveyed the other estate to the grandson. It would therefore be in utter destruction of the will to construe this into a strict condition. But there is, if possible, a still stronger objection arising out of another inflexible rule of law, that a condition to be good, must defeat the whole estate, so that the heir may enter and avoid them all; and construing this into a condition would be repugnant to the will in two important particulars, for first, it would defeat the whole limitation over to the grandson, and secondly, it would give to John and his heirs a moiety of that very estate in which they were to have nothing, unless he performed the precedent conditions. It is contrary therefore to the drift, intent and scope of the whole will, to construe this as a condition, and there is no necessity obliging the court to do so, it being a perfectly well settled rule, that the law will construe it to be a condition or a limitation, as will best subserve the intent of the testator. Thus in *Avellyne v. Ward*, 1 Vez. 420, Lord Hardwicke said, “We are bound to make such a construction as to make good the plain intention of the testator.” So Cruise, Tit. 16, Ch. 2, Sec. 30: “It has long been settled, that where, in a devise, a condition is annexed to a preceding estate, and upon the breach or non-performance

thereof, the estate is devised *over to another*, the condition shall operate as a limitation," etc. "and limitations of this kind are properly called conditional limitations." This distinction is all-important between a condition and a limitation; under the former of which, the heir would enter for non-performance and defeat the intent of the testator, and every estate in the premises provided for in the will; whereas under the latter, in case of non-performance, the limitations go successively into execution, and thus the intent of the will is carried into effect. If John had lived and failed to convey the estate at Elsinborough, it would have remained to him and his heirs, and the grandson would have taken this estate by force of the limitation to him, as the testatrix evidently intended. Nothing can be plainer than that this was intended to be a limitation for the benefit of the grandson, and not a condition for the benefit of the heir. I am of opinion therefore, that the lessors of the plaintiff who are the children of John, have no title to the premises in question, and that the verdict and judgment must go for the defendant.

Opinion of DRAKE, J.

By the will of Ann Smith, the premises in question are devised to her son, John Smith, "during his natural life;" and after his death, "to such of his lawful issue as shall arrive at the age of twenty-one years, and to the survivor of such issue;" and "for the want of such issue," in fee, to Joshua Smith and others: *Provided*, first, that the said John Smith should convey to Israel Smith certain lands (described by the testatrix); secondly, that John Smith should release to the executors of the testatrix all demands against her estate; and thirdly, that he should release to Israel Smith, all actions against him. And in case the said John Smith should refuse to make such conveyances and releases, then "this devise to be void;" and in that case the said premises are devised to the said Israel Smith and the heirs of his body.

John Smith died in the lifetime of the testatrix, and the conditions connected with the first set of devises, have not been performed.

The estates made subject to those conditions, necessary to be noticed in deciding this cause, are,

1st. A life estate, to John Smith.

2d. A fee-simple, to such issue of John as should arrive at the age of twenty-one years.

Although there be no words of inheritance, yet this estate is a fee-

simple, as well from the intent of the testator, manifest on the face of the will, as from the statute of New Jersey on this subject, Rev. Laws, p. 60. And as it is not immediately connected with, and made to vest upon the termination of the life estate of John Smith, but can vest only on a future contingency, before which the life estate has in fact terminated, it is not good as a remainder, and is sustainable only as an executory devise. Fearne on Remainders, 397, 8; 2 Croke 590.

This is also the nature of the estate tail to Israel, it being limited to take effect after a fee-simple.

The tenant in possession holds under Israel Smith. The lessors of the plaintiff are children of John Smith, both now under the age of twenty-one years.

The lessors seek to recover as *heirs at law*. And they insist, in the first place, that if the conditions, annexed to the first set of estates, are *conditions precedent*, then these conditions not having been performed, and now, since the death of John Smith, not possible to be performed, *all* the estates devised are gone, and *they* are entitled to the premises as *heirs at law*. Or, in the second place, if the conditions be *subsequent*, then, performance having been rendered impossible, by the act of God, the estates dependent upon those conditions, are freed from them, and have become absolute. And, although the executory devise to the issue of John is good, yet until some of such issue shall arrive to the age of twenty-one years, the land must descend to the heirs at law, and is now accordingly vested in themselves.

As to the first proposition, that is, that if these be conditions *precedent*, and now, by the act of God, impossible to be performed, so that the conditional estates cannot vest, the heirs shall have the property; I think it erroneous. This would be the effect of a strict condition at the common law, because none but the heir could take advantage of the breach. But in case of a further limitation of the estate, upon breach of the condition, this construction would so evidently oppose the design of the grantor, that the courts have long been in the habit of construing such, as conditional limitations; and if ever the *intent* of a deviser could operate to give that construction to a devise, it should in this case. Here, estates are given to the heir at law, and his issue, (now heirs at law) upon condition, that they confer an important benefit upon another object of the testator's bounty, her grandson, Israel Smith; and if they do not, then the estate to go to that grandson. But if the breach of the

condition would defeat all the subsequent estates created by the will, in the same lands, John Smith and his children, would be more benefited by breaking than performing the condition, and the intent of the testatrix would be frustrated. But the contrary principle is now too firmly settled to admit of dispute. It is laid down in Comyn's Digest, Title Condition T, "If a man by will devises land to his heir, upon condition that he pays, or does such an act, etc., and for non-payment, etc., devises it over; this shall be taken as a *limitation*, though there are express words of *condition*; for otherwise, the heir, who ought to enter for the condition broken, will take advantage of his own default," and see 1st Vezey 421; 14th Vezey, Jun. 345; 3d Burrows, 1624; 1st Wilson 107, and 1st Vernon 234, 304. Most of these cases, with others, are quoted in Cruise's Digest, Title Devise, Ch. 20, Sections 10 to 22 inclusive. The consequence is, that if these be conditions precedent, an estate tail has vested in Israel, and the lessors of the plaintiff cannot recover. But as to the second proposition, that if these be conditions *subsequent*, and the performance has become impossible by the act of God, the estate shall be enjoyed discharged from the conditions; and although the vesting of the estate devised to the issue of John Smith must be postponed until some of them arrive to the age of twenty-one, yet it remains with the heirs at law during the interval, and the plaintiffs, as heirs, are entitled to recover.

That this is the general rule with respect to conditions subsequent, there can be no doubt. And yet it strikes me that it cannot avail the lessors of the plaintiff in this case. John Smith died in the lifetime of the testatrix, so that no estate was vested in him. By his death, the devise to him became lapsed, and if the estate of his issue had been so connected with his, that they must have taken through him, and not as purchasers, their estate would also have lapsed by his death, 1st Vezey 420. But it is said that John's children take as purchasers. This is true. But *when* do they take? Not yet. They are not yet twenty-one years of age. It is not pretended that any estate under this devise is executed in them? And where is it? It is with the heirs at law. And shall they be divested of an estate, *yet in their hands*, upon a conditional grant of it, when the condition cannot be performed? I have discovered no case that authorizes this idea. Lord Coke says, that "if a condition annexed to lands be possible at the making of the condition, and become impossible by the act of God, yet the estate of the feoffee shall

not be avoided." And the reason he gives is, "because the estate in the land is executed and settled in the feoffee, and cannot be redeemed back again but by matter subsequent." Here then is the reason of the distinction in this respect, between conditions precedent and subsequent; and upon this reason the rule does not apply to matters executory, as a bond, recognizance, etc. Coke on Lyttleton, p. 206, Sec. 334, Bacon's Abdt., Title Condition, letter N.

Need we then inquire whether, if John had survived, the conditions would have been precedent or subsequent to the vesting of his estate. If not to be performed before *his* estate would vest, they certainly were to be performed before this devise to *his issue* could take effect, even in interest. In the case of *Doe ex dem. Planner & Wife v. Scudamore*, 2 Bos. & Pul. 297, Justice Heath says, "The question always is, whether the thing is to happen before or after, the estate is to vest; if before, the condition is precedent; if after, it is subsequent." If the conditions need not be performed before John's *life* estate could vest, they surely must be before it could end. This devise to the issue of John, then, is in fact subject to conditions *necessarily precedent* to it in point of time, and it must also be so considered in reference to the reasons upon which the distinction is founded between conditions precedent and subsequent, as affected by the circumstance of performance becoming impossible by the act of God. The result is, that if there were no further limitation, the property would remain with the heirs at law. But it was not the intention of the testatrix that this property should descend to her heirs at law. She has provided a substitute in case the first set of estates should not take effect. And, for the reason before mentioned, I am of opinion that the devise to Israel has taken effect; and, of course, that the lessors of the plaintiff cannot recover.

Judgment for defendant.

PROPRIETORS OF CHURCH IN BRATTLE SQUARE v. GRANT.

Supreme Judicial Court of Massachusetts, March Term, 1855.

[Reported in 3 Gray 142.]

A limitation, by way of executory devise, which may possibly not take effect within the term of a life or lives in being at the death of the tes-

tator, and twenty-one years (adding, in case of a child then *en ventre sa mere*, about nine months) afterwards, is void, as too remote, and tending to create a perpetuity.

A devise, subject to a conditional limitation void for remoteness, vests an absolute estate in the first taker.

A house and land were devised to the deacons of a church, and their successors, forever, "upon this express condition and limitation, that is to say, that the minister or eldest minister of said church shall constantly reside and dwell in said house, during such time as he is minister of said church; and in case the same is not improved for this use only, I then declare this bequest to be void and of no force, and order that said house and land then revert to my estate, and I give the same to my nephew J. H. and to his heirs forever." *Held*, that the devise over to J. H. and his heirs was a conditional limitation, and not upon condition; that it was void as being too remote; and that the deacons and their successors took an absolute estate in fee.

BILL IN EQUITY by the Proprietors of the Church in Brattle Square, praying for leave to sell the parsonage-house in Court street, held by them under the following devise in the will of Lydia Hancock: "I give and bequeath unto Messrs. Timothy Newell, Isaac Smith, and Ebenezer Storer, present deacons of the Church of Christ in Brattle street in Boston, whereof the Rev. Mr. Samuel Cooper is minister, and to their successors in that office, all that brick dwelling-house and land situated in Queen street, lately improved by my honored father, Daniel Henchman, Esquire, as his mansion-house, to hold the same, at and immediately upon the decease of my mother, unto the said Timothy Newell, Isaac Smith, and Ebenezer Storer, and to the deacons of the said church for the time being, forever, upon this express condition and limitation, that is to say, that the minister or eldest minister of said church shall constantly reside and dwell in said house, during such time as he is minister of said church; and in case the same is not improved for this use only, I then declare this bequest to be void and of no force, and order that said house and land then revert to my estate, and I give the same to my nephew, John Hancock, Esquire, and to his heirs forever." The said John Hancock was also made residuary devisee. The will was dated October 30th, 1765, and proved in the probate court on the 21st of November, 1777.

The bill alleged that from the decease of Mrs. Hancock the minister or eldest minister of said church had constantly dwelt and resided in

said house, during such time as he was minister of said church, and the house and land had been improved for that use only; that the sum assessed for taxes upon said estate had been and was continually increasing, and the estate required, and would from time to time require, the expenditure of large sums of money to keep it in repair; that a sale of the estate was necessary to the beneficial accomplishment of the intent of the devise; that the present deacons of the church, who now hold the legal estate in the premises, were unwilling to join in making sale thereof without the sanction and decree of this court, because John Hancock and others, heirs at law of the John Hancock named in the will, pretended that the estate was devised upon the limitation and condition that the minister or eldest minister of said church should constantly dwell and reside in said house during such time as he should be minister of said church, and that in case the same should not be improved for that use only, the testatrix ordered that the said house and land should revert to her estate, and gave and devised the same to the said John Hancock and to his heirs forever, and so, if the said house and land should be sold, the same would be forfeited and would revert to the heirs of the said John Hancock; but the plaintiffs charged the contrary thereof to be the truth, and that the devise was not upon any such condition or limitation, and that the supposed devise over to said Hancock was altogether void and of no effect; and that, if any forfeiture of said estate could or should at any time be worked, the legal title would not vest in the heirs of said John Hancock, but in certain other persons, heirs at law of the testatrix; and that if the estate should, in the opinion of this court, be deemed to have been devised and to be still holden by said deacons upon any such limitation or condition, a sale of the estate had become necessary and expedient to effect the objects of the trust, as contemplated by the testatrix.

The deacons and minister of the church, John Hancock and others, heirs of John Hancock named in the will, and the heirs at law of the testatrix, were made parties to the bill. The bill prayed for a discovery, for a decree for a sale of the estate, and an investment and application of the proceeds in such manner as should best effect the objects of the trust, and for further relief.

John Hancock and William H. Spear, two of the heirs at law of John Hancock named in the will, filed answers, in which they alleged that the condition and limitation of the devise under which the plain-

tiffs held was valid; two other heirs of said John Hancock demurred on the ground that they were improperly made parties; and all the other defendants suffered the bill to be taken for confessed.

The case was argued at March term, 1853, by *C. B. Goodrich* and *I. J. Austin*, for the plaintiffs, and *C. L. Hancock*, for the defendant Hancock.

BIGELOW, J.—The interesting and important questions involved in the present case are now for the first time brought to our consideration. In a suit in equity between the same parties, which was pending several years ago in this court, we were not called upon to give any construction to the clause in the will of Lydia Hancock, under which the deacons of the church in Brattle Square and their successors hold the estate now in controversy. The object of that suit was widely different from that of the present. The plaintiffs then assumed, by implication, that they were bound by the “condition and limitation” annexed to the devise, and the validity of the gift over on breach of the condition was not called in question by them. The single purpose then sought to be accomplished was to obtain authority to sell the estate, solely on the ground that, from various causes, the occupation and use of the premises for a private dwelling, and especially for a parsonage, in the manner prescribed in the will, had become onerous and impracticable; and the prayer of the bill was that, if a sale was authorized, the proceeds might be invested in other real estate, to be held on the same trusts and upon the like condition and limitation as are set out and prescribed in the will of the testatrix, relative to the estate therein devised to the deacons and their successors. It is quite obvious that, on a bill thus framed, no question could arise concerning the respective titles of the parties to the suit, under the devise. They were not put in issue by the pleadings, and no decision was in fact made in regard to them. That suit was determined solely upon the ground that the case made by the plaintiffs was not such as to warrant the court in making a decree for a sale of the premises upon the reasons and for the causes alleged in that bill, and above stated.

The case is now brought before us upon allegations and denials which directly involve the construction of the devise, and render it necessary to determine the respective rights of the devisees and heirs at law to

the estate in controversy. In order to decide the questions thus raised, it is material to ascertain, in the outset, the legal nature and quality of the estate which is created by the terms of the devise to Timothy Newell and others, deacons of the church in Brattle street. If the gift had been solely to the deacons of the church in Brattle street and their successors forever, without any condition annexed thereto concerning its use and occupation, it would, without doubt, have vested in them the absolute legal estate in fee. By the provincial statute of 28 G. 2, which was in force at the time of the death of the testatrix, the deacons of all Protestant churches were made bodies corporate, with power to take in succession all grants and donations, both of real and personal estate. Anc. Chart. 605. The words of the devise were apt and sufficient to create a fee in the deacons and their successors, and they were legally competent to take and hold such an estate. It therefore becomes necessary to consider the nature and effect of the condition annexed to the gift; how far it qualifies the fee devised to the deacons and their successors; and what was the interest or estate devised over to John Hancock and his heirs forever, upon a failure to comply with and perform the condition. It will aid in the solution of these questions, if we are able in the first place to determine, with clearness and accuracy, within what class or division of conditional and contingent estates the devise in question falls.

Strictly speaking, and using words in their precise legal import, the devise in question does not create simply an estate on condition. By the common law, a condition annexed to real estate could be reserved only to the grantor or deviser, and his heirs. Upon a breach of the condition, the estate of the grantee or devisee was not *ipso facto* terminated, but the law permitted it to continue beyond the time when the contingency upon which it was given or granted happened, and until an entry or claim was made by the grantor or his heirs, or the heirs of the deviser, who alone had the right to take advantage of a breach. 2 Bl. Com. 156. 4 Kent Com. (6th ed.) 122, 127. Hence arose the distinction between a condition and a conditional limitation. A condition, followed by a limitation over to a third person in case the condition be not fulfilled, or there be a breach of it, is termed a conditional limitation. A condition determines an estate after breach, upon entry or claim by the grantor or his heirs, or the heirs of the deviser. A limitation marks the period which determines the estate, without any act on

the part of him who has the next expectant interest. Upon the happening of the prescribed contingency, the estate first limited comes at once to an end, and the subsequent estate arises. If it were otherwise, it would be in the power of the heir to defeat the limitation over, by neglecting or refusing to enter for breach of the condition. This distinction was originally introduced in the case of wills, to get rid of the embarrassment arising from the rule of the ancient common law, that an estate could not be limited to a stranger, upon an event which went to abridge or destroy an estate previously limited. A conditional limitation is therefore of a mixed nature, partaking both of a condition and of a limitation; of a condition, because it defeats the estate previously limited; and of a limitation, because, upon the happening of the contingency, the estate passes to the person having the next expectant interest, without entry or claim.

There is a further distinction in the nature of estates on condition, and those created by conditional limitation, which it may be material to notice. Where an estate in fee is created on condition, the entire interest does not pass out of the grantor by the same instrument or conveyance. All that remains, after the gift or grant takes effect, continues in the grantor, and goes to his heirs. This is the right of entry, as we have already seen, which, from the nature of the grant, is reserved to the grantor and his heirs only, and which gives them the right to enter as of their old estate, upon the breach of the condition. This possibility of reverter, as it is termed, arises in the grantor or deviser immediately on the creation of the conditional estate. It is otherwise where the estate in fee is limited over to a third person in case of a breach of the condition. Then the entire estate, by the same instrument, passes out of the grantor or deviser. The first estate vests immediately, but the expectant interest does not take effect until the happening of the contingency upon which it was limited to arise. But both owe their existence to the same grant or gift; they are created *uno flatu*; and being an ultimate disposition of the entire fee, as well after as before the breach of the condition, there is nothing left in the grantor or deviser or his heirs. The right or possibility of reverter, which, on the creation of an estate in fee on condition merely, would remain in him, is given over by the limitation which is to take effect on the breach of the condition.

One material difference therefore, between an estate in fee on condi-

tion and on a conditional limitation, is briefly this; that the former leaves in the grantor a vested right, which, by its very nature, is reserved to him, as a present existing interest, transmissible to his heirs; while the latter passes the whole interest of the grantor at once, and creates an estate to arise and vest in a third person, upon a contingency, at a future and uncertain period of time. A grant of a fee on condition only creates an estate of a base or determinable nature in the grantee, leaving the right or possibility of reverter vested in the grantor. Such an interest or right in the grantor, as it does not arise and take effect upon a future uncertain or remote contingency, is not liable to the objection of violating the rule against perpetuities, in the same degree with other conditional and contingent interests in real estate of an executory character. The possibility of reverter, being a vested interest in real property, is capable at all times of being released to the person holding the estate on condition, or his grantee, and, if so released, vests an absolute and indefeasible title thereto. The grant or devise of a fee on condition does not therefore fetter and tie up estates, so as to prevent their alienation, and thus contravene the policy of the law which aims to secure the free and unembarrassed disposition of real property. It is otherwise with gifts or grants of estates in fee, with limitations over upon a condition or event of an uncertain or indeterminate nature. The limitation over being executory, and depending on a condition, or an event which may never happen, passes no vested interest or estate. It is impossible to ascertain in whom the ultimate right to the estate may vest, or whether it will ever vest at all, and therefore no conveyance or mode of alienation can pass an absolute title, because it is wholly uncertain in whom the estate will vest on the happening of the event or breach of the condition upon which the ulterior gift is to take effect.

Bearing in mind these distinctions, it is obvious that the devise in question was not the gift of an estate on a condition merely, but it also created a limitation over, on the happening of the prescribed contingency, to a third person and his heirs forever. It was therefore a conditional limitation, under which general head or division may be comprehended every limitation which is to vest an interest in a third person, on condition, or upon an event which may or may not happen. Such limitations include certain estates in remainder, as well as gifts and grants, which, when made by will, are termed executory devises,

and when contained in conveyances to uses, assume the name of springing or shifting uses. 1 Preston on Estates, §§ 40, 41, 93. 4 Kent Com. (6th ed.) 128, note. 2 Fearne Cont. Rem. (10th ed.) 50. 1 Pow. Dev. 192, and note 4. 1 Shep. Touch. 126.

That the devise in question does not create a contingent remainder in John Hancock and his heirs is very clear, upon familiar and well established principles. There is, in the first place, no particular estate upon the natural determination of which the limitation over is to take effect. The essence of a remainder is, that it is to arise immediately on the termination of the particular estate by lapse of time or other determinate event, and not in abridgment of it. Thus a devise to A for twenty years, remainder to B in fee, is the most simple illustration of a particular estate and a remainder. The limitation over does not arise and take effect until the expiration of the period of twenty years, when the particular estate comes to an end by its own limitation. So a gift to A until C returns from Rome, and then to B in fee, constitutes a valid remainder, because the particular estate, not being a fee, is made to determine upon a fixed and definite event, upon the happening of which it comes to its natural termination. But if a gift be to A and his heirs till C returns from Rome, then to B in fee, the limitation over is not good as a remainder, because the precedent estate, being an estate in fee, is abridged and brought to an abrupt termination by the gift over on the prescribed contingency. One of the tests, therefore, by which to distinguish between estates in remainder and other contingent and conditional interests in real property, is, that where the event, which gives birth to the ulterior limitation, determines and breaks off the preceding estate before its natural termination, or operates to abridge it, the limitation over does not create a remainder, because it does not wait for the regular expiration of the preceding estate. 1 Jarman on Wills 780. 4 Kent Com. 197. Besides, wherever the gift is of a fee, there cannot be a remainder, although the fee may be a qualified or determinable one. The fee is the whole estate. When once granted, there is nothing left in the donor but a possibility or right of reverter, which does not constitute an actual estate. 4 Kent Com. 10, note. *Martin v. Strachan*, 5 T. R. 107, note. 1 Jarman on Wills 792. All the estate vests in the first grantee, notwithstanding the qualification annexed to it. If, therefore, the prior gift or grant be of a fee, there can be neither particular estate nor remainder; there is no particular estate, which is an

estate less than a fee; and no remainder, because, the fee being exhausted by the prior gift, there is nothing left of it to constitute a remainder. Until the happening of the contingency, or a breach of the condition by which the precedent estate is determined, it retains all the characteristics and qualities of an estate in fee. Although defeasible, it is still an estate in fee. The prior estate may continue forever, it being an estate of inheritance, and liable only to determine on an event which may never happen. For this reason the rule of the common law was established, that a remainder could not be limited after a fee. In the present case, the devise was, as we have already stated, a gift to the deacons and their successors forever; and they being by statute a quasi corporation, empowered to take and hold grants in fee, it vested in them, *ex vi termini*, an estate in fee, qualified and determinable by a failure to comply with the prescribed condition. The limitation over, therefore, to John Hancock and his heirs could not take effect as a remainder.

It necessarily results from these views of the nature and quality of conditional and contingent estates, as applicable to the devise in question, that the limitation of the estate over to John Hancock and his heirs, after the devise in fee to the deacons and their successors, is a conditional limitation, and must take effect, if at all, as an executory devise. The original purpose of executory devises was to carry into effect the will of the testator, and give effect to limitations over, which could not operate as contingent remainders, by the rules of the common law. Indeed, the general and comprehensive definition of an executory devise is a limitation by will of a future estate or interest in land, which cannot, consistently with the rules of law, take effect as a remainder. Every devise to a person in derogation of, or substitution for, a preceding estate in fee simple, is an executory devise. 4 Kent Com. 264. 1 Jarman on Wills 778. Lewis on Perp. 72. 6 Cruise Dig., tit. 38, c. 17, §§ 1, 2. *Purefoy v. Rogers*, 2 Saund. 388 a, and note. Thus a limitation to A and his heirs, and if he die under the age of twenty-one years, then to B and his heirs, is an executory devise, because it is a limitation of an estate over after an estate in fee. This, by the rules of the ancient common law, would have been void, for the reason that they did not permit any limitation over after the grant of a previous fee. Whenever, therefore, a deviser disposes of the whole fee in an estate to one person, but qualifies this disposition, by giving the estate over, upon breach of a condition, or happening of a contingency, to some other

person, this creates an executory devise. 4 Kent Com. 268. 6 Cruise Dig., tit. 38, c. 17, § 2. Bac. Ab., Devise, I. 1 Feaune Cont. Rem. 399.

In the case at bar, the devise is to the deacons and their successors in this office forever. By itself, this gave to them an absolute estate in fee-simple; but the gift in fee was qualified and abridged by the condition annexed, and by the limitation over to John Hancock and his heirs. From the rules and principles which we have been considering, it would seem to be very clear that the devise in question did not create an estate on condition, because the entire fee passed out of the devisor by the will; no right of entry for breach of the condition was reserved, either directly or by implication, to herself or her heirs, but upon the prescribed contingency it was devised over to a third person in fee. It did not create an estate in remainder, because there was no particular estate which was first to be determined by its own limitation before the gift over took effect, and because, the prior gift being of the entire fee, there was no remainder, inasmuch as the prior estate might continue forever. It did create an executory devise, because it was a limitation by will of a fee after a fee, which, by the rules of law, could not take effect as a remainder.

This being the nature of the devise to John Hancock and his heirs, it remains to be considered whether there is anything, in the nature of the gift over, which renders it invalid, and if so, the effect of its invalidity upon the prior estate devised to the deacons and their successors. Upon the first branch of this inquiry, the only question raised is, whether the gift over is not made to take effect upon a contingency which is too remote, as violating the well established and salutary rule against perpetuities. Executory devises in their nature tend to perpetuities, because they render the estate inalienable during the period allowed for the contingency to happen, though all mankind should join in the conveyance. They cannot be aliened or barred by any mode of conveyance, whether by fine, recovery, or otherwise. 4 Kent Com. 266. 2 Saund. 388 a, note. Hence the necessity of fixing some period beyond which such limitations should not be allowed. It has therefore long been the settled rule in England, and adopted as part of the common law of this commonwealth, that all limitations, by way of executory devise, which may not take effect within the term of a life or lives in being at the death of the testator, and twenty-one years afterwards, as a term in gross, or, in case of a child *en ventre sa mère*, twenty-one years

and nine months, are void as too remote, and tending to create perpetuities. 4 Kent Com. 267. 1 Jarman on Wills 221. 4 Cruise Dig., tit. 32, c. 24, § 18. *Nightingale v. Burrell*, 15 Pick. 111. See also *Cadell v. Palmer*, 1 Cl. & Fin. 372, 421, 423, which contains a very full and elaborate history and discussion of the cases on this subject. In the application of this rule, in order to test the legality of a limitation, it is not sufficient that it be capable of taking effect within the prescribed period; it must be so framed as *ex necessitate* to take effect, if at all, within that time. If, therefore, a limitation is made to depend upon an event which may happen immediately after the death of the testator, but which may not occur until after the lapse of the prescribed period, the limitation is void. The object of the rule is to prevent any limitation which may restrain the alienation of property beyond the precise period within which it must by law take effect. If the event upon which the limitation over is to take effect may, by possibility, not occur within the allowed period, the executory devise is too remote, and cannot take effect. *Nightingale v. Burrell*, 15 Pick. 111. 4 Kent Com. 283. 6 Cruise Dig., tit. 38, c. 17, § 23. These rules are stated with great precision in 2 Atkinson on Conveyancing, (2d ed.) 264.

The devise over to the heirs of John Hancock is therefore void, as being too remote. The event upon which the prior estate was to determine, and the gift over take effect, might or might not occur within a life or lives in being at the death of the testatrix, and twenty-one years thereafter. The minister of the church in Brattle Square, it is true, might have ceased constantly to reside and dwell in the house, and it might have been improved for other purposes, within a year after the decease of the testatrix; but it is also true that it may be occupied as a parsonage, in the manner prescribed in the will, as it has hitherto been during the past seventy-five years, for five hundred or a thousand years to come. The limitation over is not made to take effect on an event which necessarily must happen at any fixed period of time, or even at all. It is not dependent on any act or omission of the devisees, over which they might exercise a control. It is strictly a collateral limitation, to arise at a near or remote period, uncertain and indeterminate, and contingent upon the will of a person who may at any time happen to be clothed with the office of eldest minister of the church in Brattle Square. It is difficult to imagine an event more indefinite as to the

time at which it may happen, or more uncertain as to the cause to which it is to owe its birth.

The more common cases of limitations by executory devise, which are held void, as contravening the rule against perpetuities, are when property is given over upon an indefinite failure of issue, or to a class of persons answering a particular description, or specifically named; as to the children of A who shall attain the age of twenty-five, or to a person possessing a certain qualification, with which he will not be necessarily clothed within the prescribed period. So gifts to take effect upon the extinction of a dignity, by failure of the lives of persons to whom it is descendible; *Bacon v. Proctor*, Turn. & Russ. 31; *Mackworth v. Hinxman*, 2 Keen 658; or depending on the contingency of no heir male or other heir of a particular person attaining twenty-one, no person being named as answering that description; *Ker v. Lord Dungannon*, 1 Dru. & War. 509; are held invalid, as being too remote. So, too, in a case more analogous to the present, where the testator devised lands to trustees, and directed the yearly rents, to a certain amount then fixed and named in the will, to be appropriated for certain charitable purposes; and provided that, in the event of there being a new letting, by which an increase of rents was obtained, the surplus arising from such increase should go to the use and behoof of the person or persons belonging to certain families, who, for the time being, should be lord or lords, lady or ladies, of the manor of Downpatrick; and in case the said families did not protect the charities established by the will, or if the said families should become extinct, then the said surplus rents were to be appropriated to said charities, in addition to the former provisions for the charity; it was held that the gift over of the surplus rents to the trustees for the charity was too remote, as the contingency upon which it was to take effect was not restricted to the proper limits. *Commissioners of Charitable Donations v. Baroness De Clifford*, 1 Dru. & War. 245, 253. In this case Lord Chancellor Sugden says, "This is a clear equitable devise of a fee qualified or limited; a fee in the surplus rents for this family, so long as they shall be lords and ladies of the manor of Downpatrick, 'in case,' (and I must here read the words in case as if they were 'whilst' or 'so long as,') certain persons protect the almshouse, etc.; and thus the limitation would assume the same character as that which is so familiar to us all, viz., while such a tree shall stand, or the happening of any other indifferent event.

Such being my opinion with respect to the estate devised to these families, I must hold the gift over void. The law admits of no gift over, dependent on such an estate; a limitation after it is void, and cannot be supported; otherwise, it would take effect after the time allowed by law." It is difficult to distinguish that case from the one at bar. The contingency of the families neglecting to protect the charities established by the will, in that case, was no more remote than that of the failure or omission of the minister of the church for the time being to reside and dwell in the house, as is prescribed by the will in the present case. Either event might take place within the prescribed period, but it might not until a long time afterwards. It can make no difference in the application of the case cited, that it was the gift of an equitable fee-simple, because the limits prescribed to the creation of future estates and interests are the same at law and in equity. Lewis on Perp. 169. 4 Cruise Dig., tit. 32, c. 24, § 1. *Duke of Norfolk v. Howard*, 1 Vern. 164.

But it is quite unnecessary to seek out analogies to sustain this point, as we have a direct and decisive authority in the case of *Welsh v. Foster*, 12 Mass. 97. It was there held, that a limitation, in substance the same as that annexed to the devise in the present case, being made to take effect when the estate should cease to be used for a particular purpose, was void, for the reason that it contravened the rule against perpetuities. That was the case of a grant by deed, with a proviso that the estate was not to vest "until the millpond [on the premises] should cease to be employed for the purpose of carrying any two mill-wheels;" and it was adjudged that the rule was the same as to springing and shifting uses created by deed, as that uniformly applied to executory devises in order to prevent the creation of inalienable estates. The limitation was therefore held invalid, as depending on a contingency too remote.

The true test, by which to ascertain whether a limitation over is void for remoteness, is very simple. It does not depend on the character or nature of the contingency or event upon which it is to take effect. These may be varied to any extent. But it turns on the single question whether the prescribed contingency or event may not arise until after the time allowed by law, within which the gift over must take effect. Applying this test to the present case, it needs no argument or illustration to show that the devise over to John Hancock and his heirs is upon a contingency which might not occur within any prescribed period, and is therefore void, as being too remote.

The remaining inquiry is as to the effect of the invalidity of the devise over, on account of its remoteness, upon the preceding gift in fee to the deacons and their successors forever. Upon this point we understand the rule to be, that if a limitation over is void by reason of its remoteness, it places all prior gifts in the same situation as if the devise over had been wholly omitted. Therefore a gift of the fee or the entire interest, subject to an executory limitation which is too remote, takes effect as if it had been originally limited free from any divesting gift. The general principle applicable to such cases is, that when a subsequent condition or limitation is void by reason of its being impossible, repugnant, or contrary to law, the estate becomes vested in the first taker, discharged of the condition or limitation over, according to the terms in which it was granted or devised; if for life, then it takes effect as a life estate; if in fee, then as a fee-simple absolute. 1 Jarman on Wills 200, 783. Lewis on Perp. 657. 2 Bl. Com. 156. 4 Kent Com. 130. Co. Lit. 206 a, 206 b, 223 a. The reason on which this rule is said to rest is, that when a party has granted or devised an estate, he shall not be allowed to fetter or defeat it, by annexing thereto impossible, illegal, or repugnant conditions or limitations. Thus it has been often held, that when land is devised to A in fee, and upon the failure of issue of A, then to B in fee, and the first estate is so limited, that it cannot take effect as an estate tail in A, the limitation over to B is void, as being too remote, because given upon an indefinite failure of issue, and the estate vests absolutely in fee in A, discharged of the limitation over. So it was early held, that where a testator devised all his real and personal estate to his wife for life, and after her death to his son and his heirs forever, and in case of the death of the son without any heir, then over to the plaintiff in fee, the devise over to the plaintiff was void, and the son took an absolute estate in fee. *Tilbury v. Barbut*, 3 Atk. 617. *Tyte v. Willis*, Cas. temp. Talb. 1. 1 Fearné Cont. Rem. 445. So, too, if a devise be made to A and his heirs forever, and for want of such heirs then to a stranger in fee, the devise over to the stranger would be void for remoteness, and A would take a fee-simple absolute. *Nottingham v. Jennings*, 1 P. W. 25. 1 Pow. Dev. 178, 179. 2 Saund. 388 a, b. 1 Fearné Cont. Rem. 467. *Attorney-General v. Gill*, 2 P. W. 369. *Busby v. Salter*, 2 Preston's Abstracts 164. *Kampf v. Jones*, 2 Keen 756. *Ring v. Hardwick*, 2 Beav. 352. *Miller v. Macomb*, 26 Wend. 229. *Ferris v. Gibson*, 4 Edw. Ch. 707. *Tator v. Tator*, 4 Barb. 431. *Conklin v. Conklin*, 3 Sandf. Ch. 64.

Such indeed is the necessary result which follows from the manner in which executory devises came into being and were engrafted on the stock of the common law. Originally, as has been already stated, no estate could be limited over after a limitation in fee-simple, and in such case the estate became absolute in the first taker. This rule was afterwards relaxed in cases of devises, for the purpose of effectuating the intent of testators, so far as to render such gifts valid by way of executory devise, when confined within the limits prescribed to guard against perpetuities. If a testator violated the rule by a limitation over which was too remote, the result was the same as if at common law he had attempted to create a remainder after an estate in fee. The remainder would have been void, and the fee-simple absolute would have vested in the first taker. 6 Cruise Dig., tit. 38, c. 12, § 20. Co. Lit. 18 a, 271 b.

The rule is, therefore, that no estate can be devised to take effect in remainder after an estate in fee-simple; but a devise, to vest in derogation of an estate in fee previously devised, may under proper limits be good by way of executory devise. If, after a limitation in fee by will, a disposition is made of an estate to commence on the determination of the estate in fee, the law, except in the case of a devise over to take effect within the prescribed period, presumes the estate first granted will never end, and therefore regards the subsequent disposition as vain and useless. Shep. Touch. (Preston's ed.) 417. It makes no difference in the application of this rule, that the condition on which the limitation over is made to depend is not *mala in se*. It is sufficient that it is against public policy. Thus in a recent case, where estates were limited to A for ninety-nine years, if he should so long live, remainder to the heirs male of his body, with a proviso that if A did not during his lifetime acquire a certain dignity in the peerage, the gift to his heirs male should be void, and the estate should go over to certain other persons, it was held that this conditional limitation was made to depend upon a condition which was against public policy and therefore void, and that the estate vested in the eldest son of A as heir male, discharged of the gift over. *Egerton v. Earl Brownlow*, 4 H. L. Cas. 1. So in the case at bar, the limitation over being upon an event which is too remote, and for that reason contrary to the policy of the law, cannot take effect. The estate therefore in the deacons and their successors remains unaffected by the gift over to John Hancock and his heirs. The doctrine on this point is briefly and clearly stated in the Touchstone: "No condition or limi-

tation, be it by act executed, limitation of a use, or by devise or last will, that doth contain in it matter repugnant, or matter that is against law, is good. And therefore, in all such cases, if the condition be subsequent, the estate is absolute and the condition void ;” “ and the same law is for the most part of limitations, if they be repugnant, or against law, as is of conditions” in like cases. Shep. Touch. 129, 133. See also 4 H. L. Cas. 160.

It is undoubtedly true that this construction of the devise defeats the manifest purpose of the testatrix, which was, on a failure to use and occupy the premises as a parsonage in the manner described in the will, to give the estate to John Hancock and his heirs. But no principle is better settled than that the intent of a testator, however clear, must fail of effect, if it cannot be carried into effect without a violation of the rules of law. 1 Pow. Dev. 388, 389.

It is to be borne in mind, however, in this connection, that the claim set up by the heirs at law of the testatrix to the premises in controversy is in direct contravention of the clear intent of the will, by which they are studiously excluded from any share or interest whatever in this estate. All that she did not specifically devise is given by the residuary clause to John Hancock. Her heirs therefore can claim only by virtue of an arbitrary rule of law ; and it certainly more accords with the general intent of the testatrix, that the absolute title in this estate should, by reason of the invalidity of the gift over, be vested in the deacons and their successors, who were manifestly the chief objects of her bounty in this devise, than in her heirs at law, whom she so carefully disinherited. The court will not construe a conditional limitation as a mere condition, and thus defeat the estate first limited, in a mode not contemplated by the testatrix.

Nor can the estate in question pass by the residuary clause. The testatrix having specifically devised the entire estate to the first taker, and upon the happening of the contingency over, to another person, could not have intended to include it in the gift of the residue. She had given away all her estate and interest in the property, and nothing remained to pass by the residuary clause. 2 Pow. Dev. 102-104. *Hayden v. Stoughton*, 5 Pick. 538. It is not like a case of a gift on a valid condition, where the right or possibility of reverter remains in the donor or devisor, which would pass under a residuary clause, or in case of intestacy, to the heirs of the donor ; but it is the case of a devise in

fee on a conditional limitation over, which is void in law. There is therefore no possibility or right of reverter left in the deviser, which can pass to heirs or residuary devisees, and the limitation over being illegal and void, the estate remains in the first takers, discharged of the divesting gift. Nor does it make any difference in the application of this well settled rule of law to the present case, that the testatrix in terms declares that the gift to the deacons and their successors shall be void, if the prescribed condition be not fulfilled. The legal effect of all conditional limitations is to make void and terminate the previous estate upon the happening of the designated contingency, and to vest the title in those to whom the estate is limited over by the terms of the gift or grant. The clause in the will, therefore, which declares the gift void in the event of a breach of the condition, and directs that the premises shall revert to her estate, does not change the nature of the estate, nor add any force or effect to the condition which it would not have had at law, if no such clause had been inserted in the will. It is simply a conditional limitation. The condition, being accompanied by a limitation over which is void in law, fails of effect, and the estate becomes absolute in the first takers. It could not revert to her estate, because there was no reversion left, the whole estate being limited over by the same devise. Such reversion could only exist in case of a simple condition, as we have already seen; and no such reverter can take place where the condition is accompanied by a limitation over. Besides, and this perhaps is the more satisfactory view of a devise of this nature, the condition operates only as a limitation, the rule being that when an estate is given over upon breach of a condition, and the same is devised by express words of condition, yet it will be intended as a limitation only. In all cases where a clause in a will operates as a condition to a prior estate, and a limitation over of a new estate, the condition takes effect only as a collateral determination of the prior estate, and not strictly as a condition. Therefore a limitation on a condition or contingency is not a condition; a clause creating contingent remainders or executory gifts by devise is properly a limitation, and though it be in such terms as to defeat another estate by way of shifting use or executory devise, still it is strictly speaking a limitation. 2 Cruise Dig., tit. 16, c. 2, § 30. Shep. Touch. 117, 126. Vent. 202. Carter, 171.

The case of *Austin v. Cambridgeport Parish*, 21 Pick. 215, cited and relied upon by the defendant Hancock, is widely different from the case

at bar. That was a grant by deed of an estate, defeasible on a condition subsequent which was legal and valid. The possibility of reverter was in the grantor and his heirs or devisees; the residue of the estate was vested in his grantee, the parish. The two interests united made up the entire fee-simple estate, and were vested in persons ascertainable and capable of conveying the entire estate. There was nothing, therefore, in that case which resembled a perpetuity, or restrained the alienation of real property. The conditional estate in the parish, and the possibility of reverter in the devisees of the grantor, were vested estates, and interests capable of conveyance, and constituting together an entire title or estate in fee-simple. This is very different from an executory devise, where only the conditional estate is vested, and the persons to whom the limitation over is made are uncertain and incapable of being ascertained until the prescribed contingency happens, however remote that event may be. No conveyance of such an estate, by whomsoever made, could vest a good title, because it can never be made certain, until after a breach of the condition, in whom the estate is to vest. Besides, in that case there was nothing illegal or contrary to the policy of the law, in the creation of the estate by the original grantor. The case of *Hayden v. Stoughton*, 5 Pick. 528, to which reference has also been made, did not raise any question as to the remoteness of the gift over, because it there vested, according to the construction given to the will, within twenty years from the death of the testator, and therefore within the prescribed period. In the case of *Brigham v. Shattuck*, 10 Pick. 306, the court expressly avoid any decision on the validity of the devise over, and decide the case upon the ground that the demandant had no title to the premises in controversy.

The result, therefore, to which we have arrived on the whole case is, that the gift over to John Hancock is an executory devise, void for remoteness; and that the estate, upon breach of the prescribed condition, would not pass to John Hancock and his heirs, by virtue of the residuary clause, nor would it vest in the heirs at law of the testatrix. But being an estate in fee in the deacons and their successors, and the gift over being void, as contrary to the policy of the law, by reason of violating the rule against perpetuities, the title became absolute, as a vested remainder in fee, after the decease of the mother of the testatrix, in the deacons and their successors, and they hold it in fee simple, free from the divesting limitation.

A decree may therefore be entered for the sale of the estate, as prayed for in the bill, and for a reinvestment of the proceeds for the objects and purposes intended to be effected by the trusts declared in the will respecting the property in question.

“When an estate is so expressly confined and limited by the words of its creation that it cannot endure for any longer time than till the contingency happens upon which the estate is to fail, this is denominated a limitation; as when lands are granted to a man so long as he is parson of Dale, or while he continues unmarried, or until out of the rents and profits he shall have made £500, and the like. In such case the estate determines as soon as the contingency happens (when he ceases to be parson, marries a wife, or has received the £500), and the next subsequent estate which depends upon such determination, becomes immediately vested without any act to be done by him, who is next in expectancy,” 2 Blackst. Com. 155.

In *The Proprietors of the Church in Brattle Square v. Grant*, 3 Gray 142, the following definition of a conditional limitation is given: “A condition followed by a limitation to a third person in case the condition be not fulfilled, or there be a breach of it.”

Creation of Conditional Limitation.

It is sometimes a little difficult, from the mere phraseology of a provision, especially one occurring in a will, to determine whether it creates an estate on condition or a conditional limitation, while certain words are peculiarly appropriate to one or the other, yet there are words which have no absolute force, and may be used for either one or the other, and while the limitation over is generally looked to as determining the intent of the instrument, yet there may be a good conditional limitation without a devise over, *McCullough's Appeal*, 12 Pa. St. 197. As, however, there is a wide difference between the nature of an estate on condition and that of one on a conditional limitation, and especially with reference to the manner of their being terminated, it becomes of importance to properly distinguish provisions creating the one or the other.

The best general rule can be derived from considering the great distinction between the two estates when created. The estate on condition has attached to it something that must be done to cause it to vest or to prevent it from being divested, or that must be left undone on peril of its de-

struction, upon the breach of which condition the estate becomes voidable, and the grantor or his heirs may destroy it by entry or some other positive act. The estate on a conditional limitation, on the other hand, has a fixed period, fixed by the happening of an event, beyond which it cannot continue; the instant the event happens, the estate is at an end, and the right of the tenant is absolutely and finally gone, without any further act on the part of any one. From this consideration may then be derived the general rule that whenever the intent of a deed or will in attaching a condition to a gift or devise of land is to compel or to prevent the performance of a certain act, there the instrument should be construed as creating an estate on condition; but where the intent is to fix certain bounds to the length of existence of an estate, there the instrument should be construed as making a conditional limitation.

The words ordinarily used in creating a condition are, as we have seen, "provided," "so that," "upon condition," etc. (*ante* p. 123); while the terms, "so long as," "while," "during," "until," are words ordinarily indicative of a conditional limitation, *Henderson v. Hunter*, 59 Pa. St. 335; *Vanatta v. Brewer*, 32 N. J. Eq. 268; *Bennett v. Robinson*, 10 Watts 348. The intent of the words, as above given, is not, however, inflexible, and there are instances where the word "provided" has been interpreted as making a conditional limitation, *Stearns v. Godfrey*, 16 Me. 158; *Chapin v. Harris*, 8 Allen 594.

A devise to R. and J. of one-third, each, of certain land in fee, and to W. of the remaining one-third, and "at the death of W. his share to be equally divided between R. and J., with this provision, in case the said W. should ever recover from the present malady under which he now labors [insanity], then he is to hold all the property devised to him for his own use and benefit," has been held to give an estate to arise by way of conditional limitation, *Montgomery v. Petriken*, 29 Pa. St. 118.

And there is even an instance of the words "upon condition," taken in connection with the rest of a deed, making a conditional limitation. In the recent case of *Camp v. Cleary*, Supreme Court of Appeals of Virginia, January term, 1882, 13 Reporter 381, a grantor conveyed by deed of gift, to his grandson, three pieces of ground, on one of which pieces stood a mausoleum, and the gift was "upon the condition that if he [the grantee] shall ever . . . in any way whatsoever alienate or dispose of the said last mentioned piece of land, or any part thereof, this deed shall cease and be void, and the said last mentioned piece of land, with the other two lots conveyed to him in fee, shall revert to and rest in his sister E. and her heirs forever." It was argued that this presented the case of a condition in restraint of alienation, and therefore void; but the Court held that it was the case of a

conditional limitation, and therefore not open to the objection urged against its validity.

The words "paying, etc.," have been adjudged to create a limitation, *Wheeler v. Walker*, 2 Conn. 196; citing *Wellock v. Hammond*, Cro. Eliz. 204; *Mary Portington's Case*, 10 Coke 41.

A grant "provided that if the grantee neglect to pay" his proportion of certain sums of money rendered, by the deed, necessary to entitle him to hold certain land given thereby, "B. and F. shall be entitled to hold the same in fee," has been held a conditional limitation, *Stearns v. Godfrey*, *supra*.

A grant of a right of watercourse with this addition, "and if by any reason the water should not be delivered in the main pipe for the space of one whole year at one time, this indenture is to cease," has been held a limitation and not a condition, enforceable or not at the will of the grantor, and the court also held that, the estate having expired, the grantor could not prevent the grantee from removing the pipes, which, according to the terms of the deed, he had a right to remove on the termination of his estate, *Owen v. Field*, 102 Mass. 105.

While the fact that on a breach the estate granted reverts to the grantor, is in general a characteristic of an estate on condition, yet the mere presence of a provision that the estate shall so revert will not cause a conditional limitation to be construed as a condition. See *Henderson v. Hunter*, 59 Pa. St. 335, in which case the deed granted certain land to the trustees of a Methodist church and their successors "so long as they use it for that purpose and no longer, and then to revert back to the original owner."

Distinction Between Estate on Condition and Conditional Limitation.

The most material difference between a condition and a conditional limitation has been already adverted to; it is this, that to render a condition effective to terminate the estate to which it is attached, it must be taken advantage of by some act, and this can be done only by the grantor or his heirs, while on the expiration of an estate by the limitation it at once ceases, and the next estate in expectancy at once vests, *Attorney-General v. Merrimack Manufacturing Co.*, 14 Gray 612; *Miller v. Levi*, 44 N. Y. 489; and a stranger may take advantage of the recurrence of the contingency on which the estate is limited, *Owen v. Field*, 102 Mass. 105. This distinction was originally introduced "to get rid of the embarrassment arising from the rule of the ancient common law that an estate could not be limited to a stranger upon an event which went to abridge or destroy an estate previously limited. A conditional limitation is therefore of a mixed nature,

partaking both of a condition and of a limitation: of a condition because it defeats an estate previously limited, and of a limitation because upon the happening of the contingency the estate passes to the person having the next expectant interest without entry or claim," BIGELOW, J., in *Proprietors of Church v. Grant, supra*. The design of the rule is to carry out the intent of the grantor or deviser, for if the estate over could not vest in possession in the grantee thereof without some act of the heirs of the grantor, the grantee might very possibly never receive the benefit intended for him, *Den ex d. Smith v. Hance*, 6 Hals. 244.

A conditional limitation is subject to the rule against perpetuities, which we have seen (*ante* p. 132) does not apply to estates upon condition, viz., that an estate given must vest within the period of a life or lives in being at the time of the death of the testator, and twenty-one years as a term in gross after the expiration of such life or lives, the period of gestation being added in the case of a child *en ventre sa mère*, 4 Kent 267; *Proprietors of Church, etc. v. Grant, supra*. And to determine whether the limitation over is void as in conflict with the above rule, the test is, must the limitation over, by the terms of the instrument, take effect, if at all, within the prescribed time? If it must *ex necessitate* take effect within the said time, the limitation over is valid; but if the event upon which it depends may or may not happen within the said time, the limitation over is void, *Id.*, and see *Davenport v. Harris*, 3 Grant 164.

Where the limitation over is void, the first granted or devised estate becomes absolute, *Proprietors of Church, etc. v. Grant, supra*.

A conditional limitation is not subject to the rule of avoidance on account of being in restraint of marriage, as in the case of a condition, for, as said by GIBSON, C. J., in *Bennett v. Robinson*, 10 Watts 348, "the object of such a limitation is not to impose a penalty, but to mark the extent of the interest given; against the terms of which equity has not power to relieve." It may be remarked that the provision in that case might have been upheld upon another ground, even if it had made a condition, as the question arose upon a devise to the widow of the testator, but the Supreme Court of Pennsylvania had not then taken the position announced by the same learned judge in *Commonwealth v. Stauffer*, 10 Pa. St. 350 (*ante* p. 129), and the decision was placed upon the distinction between a condition and a conditional limitation.

Grantee of the Subsequent Estate may, on the Expiration of the Estate first Limited, Enter at Will.

On the occurrence of the event upon which the termination of the prior estate is limited, no act is necessary on the part of the grantee of the subse-

quent estate to cause his rights to vest. He need not even give notice of his intention to take possession of the land, *Ashley v. Warner*, 11 Gray 43, and may enter when he will. His entry will, however, be at his peril, and such being the case, if, after his entry, an action is brought against him therefor, he will be allowed in defence to show that the event upon which the prior estate was limited has occurred. Thus in *Ashley v. Warner*, where there was a letting so long as the tenant should keep a good school, it was held that in action against one of the grantors for ejecting the tenant, he should be allowed to show that the tenant was deficient in literary and scientific attainments, and so incapable of keeping a good school.

Life Estate.

JACKSON EX DEM. MURPHY AND WIFE v. VAN HOESEN.

Supreme Court of the State of New York, Albany, February Term, 1825.

[Reported in 4 Cowen 325.]

The words "has bargained and sold," in a conveyance sealed, are operative to pass an estate for life.

Tenant for life, unless restrained by condition, may alien his whole estate or any less estate.

If lands are conveyed to a natural person, without words of limitation, an estate for the life of the grantee passes, unless the grantor be tenant for his own life only. Then only an estate for the life of the grantor passes. Reason of this distinction.

If tenant for years convey without limitation, his whole estate passes.

EJECTMENT for a farm in the town of Taghkanic, in the county of Columbia, tried at the Columbia Circuit, on the 30th day of June, 1823, before BETTS, C., Judge; when a verdict was taken for the plaintiff, subject to the opinion of the Court on a case.

On the 27th of May, 1798, Henry W. Livingston executed a lease of the premises in question, to John Murphy and Eve Connor, his wife, for their lives. John Murphy died about the year 1814, leaving the lessors of the plaintiff his heirs at law; and they are also his administrator and administratrix under letters dated February 26th, 1814.

The defendant claimed under and gave in evidence an instrument in writing, commencing in the usual form of articles of agreement, dated the 28th April, 1800, interchangeably signed and sealed by John Murphy, in his lifetime, and Jacob Van Hoesen, the father of the defendant; which, after naming the parties and date, ran thus: "witnesseth, that the said John Murphy of the first part *has bargained and sold* unto the said Jacob, the farm, etc." (the premises in question;) and these words, *has bargained and sold*, were the only operative words. Murphy also declared by this instrument that Van Hoesen, "is to have posses-

sion of the above premises on the 1st day of May next." The instrument then provided for paying the consideration money by instalments.

Jacob Van Hoesen took possession accordingly, and continued in possession till about 1815, when he died, leaving the defendant his heir at law, who continued in possession to the time of the trial.

The instrument in writing, executed by John Murphy and Jacob Van Hoesen, was left with one F. Hanson till about two years before the trial, who also testified that he filled up a printed blank lease for the premises from John Murphy to Jacob Van Hoesen, dated January 20th, 1814, for the parties named in it.

When the instrument of the 28th of April, 1800, was executed, Murphy's name was stricken out of the rent-book as tenant, by the agent of Livingston the landlord, and Van Hoesen's inserted as tenant of that farm; and the rents have always since been paid by Van Hoesen and his heirs.

E. Williams, for the plaintiff. The instrument in writing of the 28th April, 1800, was executory and not a present lease or conveyance; and was to have been followed up by a lease, which was never executed. It, therefore, passed no interest. 4 Cruise's Dig. Deed, ch. 33, s. 34, pp. 428, 429. *Blandford v. Marlborough*, per Ld. Chancellor, 2 Atk. 545. *Jackson v. Kisselbrack*, 10 John. Rep. 336, 337. *Roe v. Asburner*, 5 Tr. 163, 167. *Doe v. Smith*, per Ld. Ellenborough, 6 East, 535. *Goodtitle v. Way*, 1 T. R. 735.

At any rate, if it could be construed into a sub-lease or conveyance *in præsentia*, it passed only an estate for the life of the bargainee, there being no words of limitation or of inheritance. Then the death of the bargainee terminates the estate. Co. Litt. 42, a, Id. s. 283, Id. 183, a, b.

J. Sudam, for the defendant. The instrument of the 28th of April, 1800, contains apt words of conveyance, "has bargained and sold," and operates as an assignment or conveyance of the premises. *Jackson v. Kisselbrack*, 10 John. Rep. 336, and the cases there cited. Where the estate intended to be passed by a conveyance is not mentioned, it is deemed to pass an estate for the life of the grantee, if the grantor had power to sell such an estate. 1 Cruise's Dig. Estate for life, s. 4, 5, pp. 60, 61. Co. Litt. 42, a, sec. 56. Murphy, having only a life estate in the premises, could not convey for the life of his grantee; and the law

will so construe the conveyance as to have it pass the estate which he had in the premises. Co. Litt. 42, a, Id. sec. 283. Wood's Inst. 128-9, 269. The Court will also be guided by the acts of the parties, the long possession, the payment of rent, and the change of the tenant's name in the rent-roll. There is no doubt, from the context, but that Murphy intended to divest himself of all his interest. The authorities relied on against this, are where a question might arise between the tenant and the reversioner upon the effect of a common law conveyance. No such question can arise upon conveyances which take effect upon the statute of uses.

Curia, per SAVAGE, Ch. J. The questions arising in this case are,

1. Was the article an agreement for a lease, or was it a lease in itself?
2. If it was an instrument conveying a present interest, what estate passed by it?

As to the first question, it is unnecessary to examine the numerous cases to be found on the subject. They are many of them cited in *Jackson v. Kisselbrack*, 10 John. 337, which I consider decisive of this question. In that case a memorandum of an agreement was made, by which the grantor "*set and to farm let*" to the defendant certain premises; and the agreement contained a covenant that they should be surveyed, and *then the defendant was to take a lease*. The late Chief Justice, in giving the opinion of the Court, says that the last circumstance has generally given a character to the instrument of an agreement for a lease as contradistinguished from a present demise. He adds, that none of the cases contradict the position, that where there are apt words of present demise, and to them are superadded a covenant for a further lease, the instrument is to be considered a lease, and the covenant as operating in the nature of a covenant for further assurance. This case is much stronger. Here are apt words of conveyance. The contract seems to be complete, and no provision is made for any further conveyance. If the assertion be true, "that there is no case of a present demise by apt words followed by a possession, in which the instrument has not been held to pass an immediate interest," per Spencer, J., Id. 338, then certainly an immediate interest passed by the instrument under consideration.

John Murphy had an estate for the lives of himself and wife, and though the case is silent on the subject, I presume the wife is still living. The plaintiff, then, is entitled to recover, unless John Murphy conveyed

away his whole estate. What estate did he convey? Every tenant for life has the power of alienating his whole estate, or of creating any estate less than his own, unless restrained by condition. If he seeks to create a greater estate, the effort must necessarily be void for the excess, as no one can give what he has not. 1 Cruise's Dig., Estate for life, sect. 95.

If lands are conveyed to a natural person without any words of limitation whatever, he will take an estate for his own life, unless the grantor be only tenant for his own life; in which case the grantee will take an estate for the life of the grantor only. 4 Cruise's Dig., Deed, ch. 24, s. 42. But if a tenant for years conveys without limitation, his whole estate passes. *Fenton v. Foster*, Dyer, 307, b. And vid. 2 Bac. Abr., Estate for life and occupancy, (A) p. 559. Lord Coke, Co. Litt. 42, a. and 133 a., gives as a reason, the maxim in law, that every man's grant shall be taken by construction of law most forcibly against himself; and is so to be understood that no wrong be thereby done; for it is another maxim in law, quod legis constructio non facit injuriam. And, therefore, if tenant for life make a lease generally, this shall be taken an estate for his own life that made the lease; for if it should be a lease for the life of the lessee, it would be a wrong to him in reversion. The law will intend the lease to be such an one as he may lawfully make, rather than that an injury may accrue to any one. Co. Litt. 42, b.

Whether, therefore, the estate conveyed be for the life of the lessor or lessee, as both are dead, it is at an end; and as the lease to John Murphy has not expired, the plaintiff is entitled to recover. I have taken no notice of the fact of Murphy's name being stricken from the landlord's rent-book, as that only shows the opinion of his agent; nor of the unexecuted lease, as that was not prepared by the direction of the defendant.

Judgment for the plaintiff.

An estate for life is a freehold interest held by the tenant for the term of his own life or of that of some other person. Littleton, Sec. 56, 416; 1 Cru. Dig., Tit. III., ch. 1, sec. 1.

To render an estate a life estate it is not necessary that it be so limited that it must endure for the life of the grantee or of some other person; it

is sufficient that it may endure for such life and cannot endure beyond it. As said with reference to estates for the life of the tenant in *Den v. Crawford*, 3 Hals. 90, "An estate, by whatever terms expressed, which may remain to a man during his life and no longer, is an estate for life."

The class of life estates most frequently met with is the estate for the life of the tenant.

Creation of Life Estate.

Estates for life are created in two ways (1), by the act of the law, as estates in dower, by the curtesy and in tail after possibility of issue extinct; and (2) by the act of the parties to a deed, or of the devisor in a will. It is with life estates created in the latter manner that we are at present concerned.

A life estate cannot be created by parole, *Stewart v. Clark*, 13 Met. 79; *Garrett v. Clark*, 5 Oreg. 464; but may be by either deed or devise.

By Deed.

The most obvious way of creating a life estate by deed, is to express the estate granted to be for the life of the grantor, grantee, or some other person; but on account of the inflexibility of the rule requiring a grant of an estate of inheritance to contain words of inheritance, it may be said generally that, except where it is otherwise provided by statute, a deed to a person indefinitely or generally, without using the proper words of perpetuity, as "heirs," "heirs of the body," or their equivalents, will give to the grantee an estate for life, *Hunter v. Bryan*, 5 Humph. 47; *Gray v. Parker*, 4 W. & S. 17; *Jackson ex d. Murphy v. Van Hoesen*, 4 Cow. 325 [and see also cases cited in the note upon *fee-simple*, pp. 53, 57, etc.]; and where the word heirs does not appear in the granting part of the deed, the implied life estate will not be turned into a fee by a warranty to the grantee and his heirs, or a covenant with them for quiet enjoyment, *Den ex d. Roberts v. Forsythe*, 3 Dev. Law 26; *Den ex d. Snell v. Young*, 3 Ired. Law 379; *Register v. Rowell*, 3 Jones Law 312, or by a warranty against the grantor, his heirs, executors and assigns, *Patterson v. Moore*, 15 Ark. 222, for it is co-extensive with the estate warranted, and when the estate limited has run out, the warranty, no matter how large in terms, cannot revive or extend the estate, but falls with it, *Register v. Rowell*, *supra*.

A deed to one, his executors, administrators, and assigns, will give a life estate, *Clearwater v. Rose*, 1 Blackf. 137; so, also, a deed to one, and his "successors," and that even where the deed is made to the grantee as a

trustee, *Wheeler v. Kirtland*, 24 N. J. Eq. 552, modifying the opinion of the Chancellor in 23 N. J. Eq. 13.

A grant for an indefinite time as to one *quamdiu se bene gesserit*, or so long as a certain rent is paid, or until a contingent event happen, or to a woman *durante viduata* or *dum sola*, or to a husband and wife during coverture, will give a life estate, Littleton, Sec. 56, 42 a, and even where the period of limitation will, in all human probability, be far beyond the life of the grantee, if the word heirs is not used, an estate for life will be taken, as where the deed was to "J. M. and his generation, to endure as long as the waters of the Delaware run," *Lessee of Foster v. Joice*, 3 Wash. C. C. 498.

In *King v. Barns*, 13 Pick. 24, the deed granted one-half of a certain property to H., his heirs and assigns, with an habendum to H., his heirs and assigns, and continued, "and after my and my wife's decease, H. shall have the other half." It was held that H. took a life estate in the last mentioned half, and that it was not to be enlarged to a fee by the fact that the first half was granted in fee.

In *Kenniston v. Leighton*, 43 N. H. 309, a conveyance to A., "his heirs and assigns for life," then to the use of his children for life, and from and after the decease of each, his portion to descend to his children, and after the decease of the grandchildren to the use of their heirs and assigns forever, was held to give a life estate only to the children of the first taker, as the conveyance being under the statute of uses, that part of the fee which the grantor had failed to dispose of remained in him and his heirs.

A deed to A. for the use of the wife and children of B., will vest a life estate in the wife, with a remainder in fee to the children as a class, *White v. Williamson*, 2 Grant 249.

A life estate may be created by a reservation in a deed for a greater estate, *Doe ex d. Smith v. Grady*, 2 Dev. Law 395; *Den ex d. Hatch v. Thompson*, 3 Id. 411; *Hodges v. Spicer*, 79 N. C. 223.

A quit-claim deed by one tenant in common to his co-tenant will convey a life estate only, *McKinney v. Stacks*, 6 Heisk. 284.

By Devise.

We have already seen, in considering devises in fee-simple and fee-tail, that, as a rule, except where otherwise established by statute, the word heirs was necessary to create a fee by devise, and, consequently, where a devise was made generally and without words of inheritance, the estate taken by the devisee would be an estate for life; and we have also seen that to this rule the exceptions allowed for the purpose of rendering effectual the intention of the testator were very numerous. See, in addition to cases cited on

p. 57 *et seq.*, *Conoway v. Piper*, 3 Harring. 482; *Jackson ex d. Newkirk v. Embler*, 14 Johns. 198; *Miles v. Fisher*, 10 Ohio 1; in the last case a devise to A. and his successors, not being a corporation, was held to give a life estate only.

In the interest of the testator's intention not only will an estate be enlarged beyond the mere verbal grant, but if, from the whole tenor of the will, an intention to give less than is implied by the words used in the particular devise is discoverable, a devise apparently in fee may be construed to give only an estate for life; and, in furtherance of the testator's desire, even the word "heirs" may be read in another sense, as "sons," *Lyles v. Digges's Lessee*, 6 H. & J. 364; or "children," *Bunnell v. Evans*, 26 Ohio 409; and a devise to one "and her heir male forever, that is to say, her son, in case he come of age to enjoy it, but if he die before then," then over, is held to give to the first taker a life estate, *Harris v. Potts*, 3 Yeates 141. A devise in words which would clearly give an estate in fee, will be construed a devise for life if the will contains a devise over on the death of the first taker, *Jones's Ex'rs v. Stites*, 19 N. J. Eq. 324, and even if there is a devise over on the happening of a contingency connected with the life of the first taker, as a devise over in case the first taker shall never have children, *Hatfield v. Sneden*, 42 Barb. 615; see, also, *Norris v. Beyea*, 3 Kern 273. Where, however, the devise over, after the death of the first taker, is for life, and the fee can be sustained without destroying the life estate, both will be upheld, and on the death of the first taker, the remainder-man will take an estate for life, leaving a remainder in fee to the heirs of the first taker, *Jones v. Bramblet*, 2 Ill. 276.

A devise of an "improvement," followed by a devise over, will give a life estate only, *Bowers v. Porter*, 4 Pick. 198; *Wilmarth v. Bridges*, 113 Mass. 407.

A devise to a wife "forever and during her life," will carry but a life estate, *Sheafe v. Cushing*, 17 N. H. 508.

A life estate will not be enlarged to a fee by words, contained in the preamble to a will, showing an intention to dispose of the whole estate of the testator, unless there is some connection between the preamble and the devising clause, *Hall et al. v. Goodwyn*, 2 N. & McC. 383; *Beall v. Holmes*, 6 H. & J. 205; *Jackson v. Wells*, 9 Johns. 222; or the will contains some provision inconsistent with the gift of an estate for life only, *Wheaton v. Andress*, 23 Wend. 452, and the preamble will never be allowed so to control material words of a devise as to convert a life estate into a fee, *Sheafe v. Cushing*, 17 N. H. 508; see, also, *Olmstead v. Harvey*, 1 Barb. 102; S. C. 1 N. Y. (Comst.) 483, and note and cases *ante*, p. 62.

Where a general devise of land is made with words forbidding the dev-

isee to sell or incumber it, the devise, in the absence of a contrary intent otherwise appearing on the face of the will, will be held to be of an estate for life, *Grim's Appeal*, 1 Grant 209; and the devise so restrained will be held to be for life, even where there is a provision for the *descent* of the land to children, where the will recites that the interest of the first taker is for life only, *O'Byrne v. Feeley*, 61 Ga. 77.

While a devise in general words, accompanied by a charge or burden upon the devisee in respect to the devise, is often held to give a fee, for reasons stated *ante*, p. 67, the rule is strictly applied, and the charge must be upon the person of the devisee in respect to the land devised; a charge upon the land itself will not have the effect of converting the presumptive life estate into a fee, *Olmstead v. Olmstead*, 4 Comst. 56; *Lippen v. Eldred*, 2 Barb. 130; *Stevens v. Winship*, 1 Pick. 318; *Mesick v. New*, 7 N. Y. 163; see, also, *Lessee of Ferguson v. Zepp*, 4 Wash. C. C. 645; *Jackson v. Martin*, 18 Johns. 31, and the charge must be a real one, imposing some actual burden, even if a very light one, to be borne after the death of the testator, or if the charge be in the shape of services to be performed prior to the death of the testator, it must be shown to have been known to the devisee, so that the performance of the services was induced by the hope of obtaining the devise. This is well illustrated in *Farrar v. Ayres*, 5 Pick. 404. In that case the will contained a devise to the testatrix's coachman and his wife on condition that the coachman continued to serve the testatrix during her life, and conducted himself to her satisfaction. It was argued that the devise gave a fee, but the Court held that a life estate only was taken. PUTNAM, J., saying: "In regard to the supposed charge upon the devisee, it is sufficient to say that it did not survive the testatrix; she gave the estate upon condition that the devisee should serve her as coachman so long as she should require him, but she did not subject him to any charge or duty upon taking the estate after her decease—and it does not appear that the devise was intended as a satisfaction for the services of the devisee, or that he ever knew of the provision which his mistress had made for him, until after her death. It cannot be said then that this estate came to the devisee subject to any charge. What is given, whether in fee or for life, is given in a manner to be enjoyed, without any payment or duty to be made or performed by the devisee."

An express devise for life will not be enlarged to a fee by a charge, *Moore v. Dimond*, 5 R. I. 121, and the same rule is to be applied where there is a plain intent to create a life estate discoverable, as said by PARKER, C. J., in *Bowers v. Porter*, 4 Pick. 198, "where the intention to create a life estate is deducible from the expressions of the will, the estate cannot be enlarged by construction although it is burdened with duties."

While a devise of land in general terms, accompanied by an absolute power of disposition, will carry a fee (see *ante*, p. 64), a devise in terms for life with such power does not become a fee in the hands of the devisee, and if the power is never exercised the estate remains one for life simply, and will revert to the heirs of the testator on the death of the devisee, *Dunning v. Van Dusen*, 47 Ind. 423; *Henderson v. Vaulx*, 10 Yerg. 30; *Frazier v. Hassey*, 43 Ind. 310; *Denson v. Mitchell*, 26 Ala. 360; *Benesch v. Clark et al.*, 49 Md. 497; *Ramsdell v. Ramsdell*, 21 Me. 288; *Shaw v. Hussey*, 41 Id. 495; *Hale v. Marsh*, 100 Mass. 468; *Cummings v. Shaw*, 108 Id. 159; *Collins v. Carlisle's Heirs*, 7 B. Mon. 13; *Pulliam v. Byrd*, 2 Strobb. Eq. 134; *Fairman v. Beal*, 14 Ill. 244; *Andrews v. Brumfield*, 32 Miss. 107; *Rail v. Dotson*, 14 Sm. & M. 176; *Stevens v. Winship*, 1 Pick. 318; *Troy v. Troy*, Winst. Eq. 77; but if the power is exercised, the vendee or appointee thereunder will take an estate in fee, *Ramsdell v. Ramsdell*, *Shaw v. Hussey*, *Hale v. Marsh*, *Cummings v. Shaw*, *supra*. A devise to executors of the power to sell realty does not vest in them any estate, but the fee remains in the heir until the power is exercised, *Ex'rs of Ware v. Murph*, Rice 54.

A direction in a devise of land, that it shall be equally divided among certain persons, will not, by construction, give them more than a life estate, *Edwards v. Bishop*, 4 N. Y. (Comst.) 61, the words "to be equally divided" going to the quality and not to the limitation of an estate, *Jackson v. Luguere*, 5 Cow. 221; *Jackson v. Bull*, 10 Johns. 148; *Van Alstyne v. Spraker*, 13 Wend. 578; and a devise to several, to be equally divided, to them for life, and after their deaths to their lawful issue, and if any one should die leaving no issue, his or her share to be divided among the survivors, will give estates for life with fees, and, in South Carolina, conditional fees, in remainder, *McCorkle v. Black*, 7 Rich. Eq. 407.

As a general rule, a devise to one and his children, he having no children at the time the devise is made, will be construed as giving to the devisee an estate tail, see *ante*, p. 97, but this rule is subordinate to the intention of the testator, and such a devise may be so explained by other expressions in the will as to pass an estate for life only. In *Sisson v. Seabury*, 1 Sumn. 235, the devise was to A. and his male children, lawfully begotten of his body, and their heirs forever, to be equally divided among them and their heirs forever. A. had, at the time the devise was made, no children, yet the estate given was held to be for life to A., with remainder to the children. STORY, J., regarding the provision for an equal distribution as inconsistent with an intention to give an estate tail. Where estates tail have been turned into fees by statute, it is at least questionable whether the intent of the testator will not often be defeated, rather than carried into effect, by the

enforcement of the rule; and the Supreme Court of Kentucky has so held. In *Carr v. Estill*, 16 B. Mon. 309, that Court departed from the general rule, and held a devise to an unmarried woman and her children, a devise for life to the first taker, with a remainder to the children afterwards born in wedlock. CRENSHAW, J., in delivering the opinion of the Court, discussed the rule and the reason thereof, as follows: "In general, the word 'children' is a word of purchase and not of limitation, and as it was acknowledged by the jurists of England that the word in its present connection manifested a certain intent on the part of the testator that the children should take under the devise, and as they would do so there, if the word were construed to be a word of limitation and not a word of purchase, it was natural and easy for the English judges to make an exception to the general acceptance of the word, and so construe it as to render the estate devised an estate tail; and as this was a convenient mode of giving effect to the intention of the testator, the courts of England adopted it without perhaps bestowing much consideration on the question whether the testator might not have intended to give a life estate to the person *in esse*, remainder to the children, which might equally have effectuated his intention. However this may be, it is clear that they adopted their rule of construction to promote the intention of the testator; and our law having converted estates tail into absolute fee-simple estates, it is equally clear that if we adopt the same rule of construction the acknowledged intention will be frustrated and defeated, as the children could thus take nothing under the devise. . . . It has been observed, the words of the devise abstractly and literally impart an immediate gift not only to the devisee in being, but to those not in being. But there being no children *in esse* at the time of the devise, it could not have been the intention to give an immediate estate to them, for that were impossible; and as the words of the devise, as conceded by all the authorities, manifest a clear intent that the children shall take, the only consistent and rational construction is that the testator intended the devisee in being at the time should take a life estate, remainder to the children;" and see, also, *Wood v. Griffin*, 46 N. H. 231.

The use in a devise of the word "children," in connection with the words "heirs of the body," has often the effect of destroying what would otherwise have been an estate tail, and rendering it a life estate, *Goss v. Eberhart*, 29 Ga. 545, in which LUMPKIN, J., said: "The employment of this term [heirs], therefore, indicates that the children were not to take a present estate, but one that should come to them after the death of their mother."

A life estate will be given by a devise to one "for her own benefit and separate support, and of her children and family," with a devise over on

her death, *Jossey et ux. v. White*, 28 Ga. 265; and a devise to daughters of the testator and their heirs, "the said property to remain in the hands of my executors for the benefit of my said daughters during their respective lives, and then the remainder to be given up to their heirs," will give a life estate to the daughters, and vest none in the executors, *Knight v. Weatherwax*, 7 Paige 182.

A life estate may be given by implication without words of direct gift; thus a devise, "after my death and the death of my wife, I give to B.," etc., will give a life estate to the wife surviving the testator, *Barry v. Shelby*, 4 Hayw. 229; and a devise to be divided among the children of R., he and they enjoying the benefit while he lives, will give a life estate to R., *Haskins v. Tate*, 25 Pa. St. 249.

In the case of a will made by an unlettered person, a devise giving lands to be equally divided among sons and daughters, and containing further provisions which contemplated keeping the property together during the lives of the sons and daughters, and even afterwards, has been held to give an estate in trust for the sons and daughters, so long as they continued members of the family, for their lives, and afterwards to their children, *Bunch v. Hardy*, 3 Lea 543.

A devise in general terms to G., with the following addition, "now the condition is that the property is to remain to G. and his child and children, and in case he should die without leaving children," then over, has been held to give a life estate to G., with remainder to the children, *Hill v. Thomas*, 11 S. C. 346.

A devise of the right to occupy, possess, or enjoy lands for life, will give a life estate, *Winsthoff v. Dracourt*, 3 Watts 240; *Kearney v. Kearney*, 17 N. J. Eq. 59, S. C. on Appeal, Id. 504, or a devise giving the right for an indefinite time at the option of the devisee, *Piper's Estate*, 2 W. N. C. 711. See also the *Succession of Law*, 31 La. Ann. 456.

The mere fact that the devise is a devise over, after a precedent life estate, does not cause it to be necessarily construed as a fee—thus a devise of a plantation to E., subject to a life estate in her mother, will give to E. a life estate only, *Calhoun v. Cook*, 9 Pa. St. 226.

A devise to one and his children, there being a child or children living at the time of the devise, will be held to give a life estate to the devisee with a remainder in fee to the children as a class, so that after-born children will be entitled to share in the remainder equally with those already in existence, *Hannan v. Osborn*, 4 Paige 336; *Reeder v. Spearman*, 6 Rich. Eq. 88.

A devise "to F., and if he should die before his wife, it is my will that the land return to my legatees . . . but should he outlive his wife, then to

F. in fee," gives a life estate to F., with a contingent remainder in fee, *Den v. Crawford*, 3 Hals. 90.

A devise to two daughters, to be equally divided between them, share and share alike, and to be to them for and during their natural life, and after their death to be to their and each of their children, and to be divided between them, share and share alike, gives a life estate only to the daughters, with a remainder to the children of each, as tenants in common, *Bool et ux. v. Mix*, 17 Wend. 119.

A devise to a wife and her husband for their lives and the life of the survivor, "subject to be divided among the heirs of her body," and in default of heirs of the body, then over, gives a life estate, *Self's Adm'r v. Tune*, 6 Munf. 470.

A devise as follows, "I *lend* to O. R. . . . if in case said O. R. should live to arrive at manhood, and beget heirs lawfully, the above property to him and his heirs forever," followed by a devise over, was held to give a life estate, to be enlarged to a fee, upon the birth of issue, *Felton v. Billups*, 1 Dev. & Bat. 584.

Where a devise was made of land to be divided among the testator's wife and his half sisters, "as the law directs," the law referred to was held to be the intestate law, and as that gave the widow but a life estate in her portion, she was held to take no more under the will, *Benton v. Benton*, 4 Harring. 38.

A devise that the testator's son "shall have all the land I have any right, title, or claim to, either by law or equity," except certain land previously devised to a daughter, expressly in fee, will give a life estate only, *Dougherty v. Monett's Lessee*, 5 G. & J. 459.

In those States where the statutes have turned fees-tail into estates for life in the first taker in tail, with a remainder either to the heir at law or the issue of the devisee, a devise in tail will be interpreted as giving an estate for life, with remainder over, *Chiles v. Bartleson*, 21 Mo. 344; *Blair v. Van Blaricum*, 71 Ill. 290, and where by statute or otherwise it is held that words of perpetuity are not necessary to a devise to make a fee, still where a life estate is given by implication, it will not be enlarged to a fee without such words, *Fuller v. Bates*, 8 Paige 325.

Where a life estate is given in a will, it will not be held to be destroyed by a subsequent devise of the fee in the same instrument, if by any construction, consistent with law and reason, the two estates can be both upheld. The law on this subject is thus stated by THOMPSON, J., in *Wilson v. McKeegan*, 53 Pa. St. 79: "The rule is to regard the first taker as the preferred object of the testator's bounty, and in doubtful cases the construction leans in favor of making the gift to him or her as effectual as possible."

In *Chesebro v. Schoolcraft*, 25 Wend. 633, the testator devised land for life to his widow, and afterwards devised one-third thereof to a daughter, with power to sell the same after the death of the widow, another third to a second daughter with a like power, and the remaining third to a third daughter, without making any mention of the widow. It was held that the widow's life estate in the last third was not revoked, but that she would hold her entire devise for life.

In *Hodges v. Potter*, 12 R. I. 245, there was a will containing several clauses. The first clause gave a life estate in certain realty to the testator's wife; the seventh, a remainder in fee in the same to the testator's son. The ninth provided that in case the son died without leaving issue, the executors should see that the will was carried into effect; and the tenth and eleventh clauses gave the land in fee to other persons, without mentioning the widow. The son died without issue. The Court held that the tenth and eleventh clauses did not destroy the life estate given to the widow, but were merely substitutionary bequests of what had been given to the son, and the devisees would take the fee, subject to the same life estate as that to which the son's fee was subjected.

In *Wilson v. McKeehan*, *supra*, the devise was "to my wife and three children, all the proceeds of my farm during her natural life. . . . If all my children should die before my wife, I allow my wife one-half of my real estate." The other half was devised over. The children all died before their mother, and it was held that her life estate in the half devised over was not destroyed. See also *Beekman v. Hudson*, 20 Wend. 53; *Roundtree v. Talbot*, 89 Ill. 246.

Rights and Liabilities. Rents and Profits.

The life tenant is entitled to all the rents and profits of the land accruing during the term of his estate, absolutely, *Forsey v. Luton*, 2 Head. 183; *McC Campbell v. McC Campbell*, 5 Litt. (Ky.) 92; *Brooks v. Brooks*, 12 S. C. 422. On the death of the life tenant such profits will go to his executors, although the estate is held under a will which provides that none of the property shall be sold before the death of the life tenant, "but the same, together with the increase thereof, shall be kept together," *Tatum v. McLellan*, 56 Miss. 352, and rents accruing, but not due at the time of the death of the life tenant, will be apportioned between his estate and the remainderman, *Borie v. Crissman*, 82 Pa. St. 125. A life tenant may permit the occupation of her land by another without the payment of rent, *McC Campbell v. McC Campbell*, *supra*.

Right to Possession where Necessary for Enjoyment of the Life Estate.

If possession is necessary for the full enjoyment of a life estate, a court of equity will put the equitable life tenant in possession as against his trustee, *Williamson v. Wilkins*, 14 Ga. 416.

Right to Proceeds in Case of Sale of Estate.

If an estate is sold, the life tenant has a right to the proceeds thereof for life, *Styer's Appeal*, 2 Grant 249.

Limitation of Right of Recovery for Damage to the Realty.

In case any damage is done to the real estate, the right of recovery of the life tenant is limited to the amount of damage done to the life estate, *Sagar v. Eckert*, 3 Bradw. 412, and where, by virtue of the exercise of the right of eminent domain, the land is taken for public purposes, as a railroad or other work of a more strictly public character, the life tenant will be entitled to receive separate damages for the injury done to his life interest, *Joyner v. Conyers*, 6 Jones Eq. 78; *Pittsburgh, Virginia, and Charlestown R. R. v. Bentley*, 6 W. N. C. 289; *Borough of Harrisburg v. Crangle*, 3 W. & S. 460, and the rule, where general damages are given for the taking of land, is that they belong to the life tenant and remainder-man in proportion to the inconvenience suffered by each, *Joyner v. Conyers, supra*. The life tenant may bring his action without joining the remainder-man, *R. R. v. Boyer*, 13 Pa. St. 496.

Liability of Life Estate for Debts of Life Tenant.

The life estate is liable for the debts of the life tenant, and a levy on the land itself for his debts will be upheld as a levy on the estate, *Roberts v. Whiting*, 16 Mass. 186, and, when levied upon, the life estate should be appraised as should any other estate of freehold, and only such portion taken as, including the debtor's whole interest, will be sufficient to pay the debt, *Wheeler v. Gorham*, 2 Root 328.

Emblements.

The life tenant has the right to crops of wheat or other grain growing at the time of his death, as emblements, *Poindexter v. Poindexter*, 1 Ired. Eq. 286; *Perry v. Toller*, 1 Dev. & B. Eq. 441; *Hunt v. Watkins*, 1 Humph. 498; but uncut grass standing at the time of the death will not be regarded as within the term emblements. The reason for this distinction is stated by

READ, J., in *Reiff v. Reiff*, 64 Pa. St. 134: "The vegetable chattels called emblements are the corn and other growth of the earth which are produced annually, not spontaneously, but by labor and industry, and thence are called *fructus industriales*. The growing crop of grass, even if grown from seed, and though ready to be cut for hay, cannot be taken as emblements, because, as it is said, the improvement is not distinguishable from what is natural product, although it may be increased by cultivation."

Estovers.

The tenant for life is entitled to proper estovers, and may take from the land the wood necessary for his fuel, fencing, and necessary repairs, *Elliot v. Smith*, 2 N. H. 430; *Smith v. Jewett*, 40 Id. 530; *Smith v. Poyas*, 2 Dess. 65, and the right to fuel will embrace a right to take fuel not only for the house of the life tenant, but also for the use of a servant or farmer who cultivates the land for the life tenant, *Smith v. Jewett*, *supra*, and it has been held that the fuel may be so taken even if the servant resides on an adjoining tract, *Gardiner v. Dering*, 1 Paige 573; but it would seem that this extension of the right to fire bote must be exercised in accordance with the circumstances of the case. Thus, in *Sarles v. Sarles*, 3 Sand. Ch. 601, a life tenant of a tract of some one hundred and sixty-five acres was held not entitled to take fuel from the land for the supply of the dwelling-house of his farmer, in addition to the supply necessary for his own house, and it was also held that a custom to that effect would be unreasonable and invalid. He has no right to cut timber for sale or to sell it when cut, for, as said in *Miles v. Miles*, 32 N. H. 147, when it is permitted to the tenant to cut wood or timber for purposes disconnected with the premises, he is no longer using his life estate in the land, but is converting to his own use the permanent growth of the earth. See also *Johnson v. Johnson*, 18 N. H. 594. He will not be allowed to sell timber, although the amount sold be less than he would have a right to consume for proper purposes, *Fuller v. Wason*, 7 N. H. 341, and although the timber sold were disposed of to procure fuel or to pay for the expense of bringing it to the house, *Paddelford v. Paddelford*, 7 Pick. 152. The same rule will, of course, apply to a case where the wood was sold to defray the expense of repairs; but in *Loomis v. Wilbur*, 5 Mason 13, STORY, J., applied a different rule, as follows: "If the cutting down of the timber was without any intention of repairs, but for sale generally, the act itself would doubtless be waste; and if so, it would not be purged or its character changed by a subsequent application of the proceeds to repairs. But if the cutting down and sale were originally for the purpose of repairs, and the sale was an economical mode of making the repairs, and

the most for the benefit of all concerned, and the proceeds were *bona fide* applied for that purpose, in pursuance of the original intent, it does not appear to me to be possible that such a cutting down and sale can be waste. It would be repugnant to the principles of common sense that the tenant should be obliged to make the repairs in the way most expensive and injurious to the inheritance."

The ruling in this case has been explained, by Mr. Washburn and others, on the ground that it was in a "hard" case. The tenant had only cut some ten or fifteen trees, was very poor, and unable otherwise to make necessary repairs. All the trees, except one or two, were sold to buy boards for the said repairs, and it was shown to the Court that by this means the repairs could be most advantageously and economically made. It is thought, however, that while there can be little doubt of the substantial justice done by the decision, it is not of sufficient authority to establish a rule that a sale of wood may be made if thereby repairs may be most economically made. To establish such a rule would open wide a door for litigation, if not for fraud.

Right to work Mines, Quarries, or Pits.

The tenant for life has the right to work mines, quarries, clay-pits, or sand-pits, opened or used by former owners, *Executors of Reed v. Reed*, 16 N. J. Eq. 248; *Billings v. Taylor*, 10 Pick. 460; *Coates v. Cheever*, 1 Cow. 460; *Rockwell v. Morgan*, 2 Beas. 389; *Neel v. Neel*, 19 Pa. St. 324; *Lynn's App.*, 31 Id. 44; nor will such right be limited or restrained by a statute providing that the tenant for life shall have "reasonable and necessary use and enjoyment" of the land, *Irwin v. Covode*, 24 Pa. St. 162; the work may be without stint, and it is permissible to open new pits or shafts into the mine or pit, *Crouch v. Puryear*, 1 Rand. 258; *Kier v. Peterson*, 41 Pa. St. 357; *Westmoreland Coal Co.'s Appeal*, 85 Id. 344, but the opening must be made or the mining conducted on the same tract already opened and worked, and therefore where there were two tracts, on one of which a shaft had been sunk, while on the other the ground was not broken, separated by another which did not belong to the tenant for life, and a vein of coal extended under all three tracts, it was held that the tenant for life could not mine under and take coal from the unopened tract, nor could his lessee, although the owner of the intermediate tract, *Westmoreland Coal Co.'s Appeal*, *supra*.

A life tenant has no right to open new mines, *Coates v. Cheever*, 1 Cow. 460, or to dig soil and use wood for the purpose of making brick, *Livingston v. Reynolds*, 2 Hill 157.

A question sometimes arises how far a mine which has been opened and worked, and then has been left idle for a number of years, is to be considered an open mine, so that it may be lawfully worked by the life tenant. In *Gaines v. Green Pond Iron Mining Company*, 32 N. J. Eq. 96, the predecessor in title of the life tenant had worked a mine in 1812 or 1814, and then ceased work, and allowed the mine to remain undisturbed until his death in 1872. The Chancellor held that the long non-use showed an abandonment of the property as mining property, and that the life tenant had no right to work the mine. The decree was, however, reversed by the Court of Errors and Appeals in 32 N. J. Eq. 603, and the following rule was laid down by VAN SYCKEL, J., in delivering the opinion of the Court: "The rule by which the right of the life tenant to work open mines is to be tested is not the length of time that may have elapsed since the last working of the mines, but it depends upon whether the owner of the fee merely discontinued the work for want of capital or because it did not prove profitable, or for any other like reason, or whether he abandoned it with an executed intention to devote the land to some other use."

Obligation to Repair,

The life tenant is bound to keep the property in repair so far as is necessary to prevent it from falling into dilapidation, *Brough v. Higgins*, 2 Gratt. 408; *Cochran v. Cochran*, 2 Dess. 521; *Ex'rs of Kearney v. Kearney*, 17 N. J. Eq. 59, Id. 504. As said by ZABRISKIE, Ch., *In re application for the sale of the lands of Mary E. Steele, an infant*, 19 N. J. Eq. 120, "the life tenant is bound to keep the premises in as good repair as they were in when he took them, not excepting ordinary wear and tear; if a new roof is needed, he is bound to put it on; if paint wears off, he is bound to repaint." See also *Piper's Estate*, 2 W. N. C. 711; *Wilson v. Edmonds*, 24 N. H. 517. He is not bound, however, to expend any extraordinary sum, *Wilson v. Edmonds, supra*; *Brooks v. Brooks*, 12 S. C. 422, nor to rebuild where buildings have been destroyed by the act of God, *Brooks v. Brooks, supra*.

Permanent Improvements—Fixtures.

If permanent improvements are made by the tenant for life, they will become part of the inheritance, and the tenant will not be permitted to call on the remainder-man to contribute to the expense thereof, the rule being that the life tenant can neither repair nor make permanent improvements at the expense of the inheritance, *Sohier v. Eldredge*, 103 Mass. 345; *Austin v. Stevens*, 24 Me. 520; *Thurston v. Dickinson*, 2 Rich. Eq. 317; *Merritt*

v. *Scott*, 81 N. C. 385. The rule is not, however, without exception. Thus where the improvement consists of the tenant for life going on with and finishing an improvement permanently beneficial, and which has been begun by the donor of the estate, the remainder-man may be required to contribute, *Corbett v. Laurens*, 5 Rich. Eq. 301; *Sohier v. Eldredge*, *supra*. See also *Ex parte Palmer*, 2 Hill, Ch. 217; and it has been held that in such cases the putting of a building into a tenantable condition may be a charge on the estate at large, while the keeping it in repair afterwards should fall on the life tenant, *Parsons v. Winslow*, 16 Mass. 361; *Sohier v. Eldredge*, *supra*. It is also held that where the life tenant has made an improvement for the benefit of himself and the remainder-man, and the property is subsequently sold to promote the interests of both, the life tenant is entitled to be allowed the value of the improvement at the time of the sale, *Gambril v. Gambril*, 3 Md., Ch. 259.

If a house is built by the reversioner upon the land of the life tenant with his consent, the house becomes part of the realty, and the assignee of the reversioner cannot enter upon the house and hold the same against the tenant for life, *Cooper v. Adams*, 6 Cush. 87.

The question how far the relaxation of the rule that whatever is annexed to the freehold becomes part of the inheritance, which has obtained to so great an extent between a tenant for years and his landlord, has been recognized in favor of a life tenant, is one, perhaps, not satisfactorily settled. In *Buckley v. Buckley*, 11 Barb. 43, HAND, J., was "inclined to think that a tenant for life who erects a fixture for the purposes of trade or manufacturing had an equal right in respect to their removal with a tenant for years." The learned judge, however, admitted that the cases had not generally gone that far, and the current of authority is to the effect that much less liberty of removal will be allowed to a tenant for life than to one for years. See *Austin v. Stevens*, 24 Me. 524; *Doak v. Wiswell*, 38 Id. 519; *White v. Arndt*, 1 Whart. 91; *McCullough v. Irvine's Ex'rs*, 13 Pa. St. 438. In *Cannon v. Hare*, 1 Tenn. Ch. 22, Chancellor COOPER thus states his view of the result of the authorities: "I take it, therefore, that a tenant for life or his representatives are not entitled to remove buildings of a permanent character, and that permanency may be predicated of all buildings which appear, either by the intention of the party erecting them, the manner of attachment to the soil, or the uses to which they are put, to have been designed as additions to the freehold or to enhance its income or convenience. It is probable, also, that the exception in favor of buildings erected for the purposes of trade will be limited in the case of a tenant for life to such as are erected for the purposes of trade proper, and will not be extended to occupations having an affinity or resemblance to trade," and

suggested as a reason for the distinction the following: "Tenants for life are usually widows as dowresses, or husbands as tenants by curtesy or devisees under wills, with remainders to children or other blood relations; the persons entitled on remainder in such cases are ordinarily those nearest in ties of affection and blood to the tenant of the life estate. It may be well presumed, as between such parties, that improvements put upon the property by the life tenant are not designed for the temporary use of such tenant, but as permanent additions."

(For a discussion of the question of fixtures, see Vol. II.)

Obligation to Keep down Interest upon Incumbrances, but not to Contribute to their Extinction.

The tenant for life is bound to keep down the interest of incumbrances upon the estate, *Cogswell v. Cogswell*, 2 Edw. 231; *Hunt v. Watkins*, 1 Humph. 498; *McDonald v. Heylin*, 4 Phila. 73; *Mosely v. Marshall*, 27 Barb. 42; *Jones v. Sherrard*, 2 Dev. & B. Eq. 179; *Barnum v. Barnum*, 42 Md. 251; *Jewell's Estate*, 1 W. N. C. 404; but he is not bound to contribute to the extinction of the principal, *Cogswell v. Cogswell*, *Jones v. Sherrard*, *Mosely v. Marshall*, *supra*; and if he does so contribute he will be entitled to a credit of the amount of his contribution as against the remainder-man, *Hunt v. Watkins*, *supra*, and hence if the life tenant purchase any portion of the principal of a debt which is an incumbrance upon the estate, the presumption is that it was purchased for the benefit of the life tenant himself, *Barnum v. Barnum*, *supra*, and if a mortgage is called in by the mortgagee the remainder-man must pay his proper share of the mortgage money, *Cogswell v. Cogswell*, *supra*.

If the life tenant allow the arrears of mortgage to remain unpaid so that the land is sold on an execution by the mortgagee, he is liable in damages to the remainder-man, *Wade v. Malloy*, 16 Hun. 226.

Where a debt, which is a charge upon the land, is not established until after the death of the life tenant, his estate cannot be called upon to contribute to the payment of either principal or interest, *Poindexter's Ex'rs v. Green's Ex'rs*, 6 Leigh 504.

Obligation to pay Ordinary Taxes.

The tenant for life must also pay the ordinary taxes upon the land held by him, *Varney v. Stevens*, 22 Me. 331; *Patrick v. Sherwood*, 4 Blatch. 112; *Cairns v. Chabert*, 3 Edw. 312; *McDonald v. Heylin*, 4 Phila. 73; *Fleet v. Dorland*, 11 How. Pr. 489; *Johnson v. Smith*, 5 Bush. 102; *Wade v. Malloy*,

16 Hun. 226; *Jewell's Est.*, 1 W. N. C. 404; *Piper's Est.*, 2 Id. 711; *Fox v. Long*, 8 Bush. 551; and if he neglect or refuse to pay the taxes, and suffer the land to be sold, and buy it in, he will not be allowed to set up the tax title against the remainder-man or reversioner, for that would be taking advantage of his own wrong, *Patrick v. Sherwood*, *supra*. In Ohio a life tenant suffering a sale of his land for taxes, forfeits his life estate, and will not be allowed to redeem the land. *McMillan v. Robbins*, 5 Ohio 28.

In the case of *Cairns v. Chabert*, 3 Edw. 312, it was intimated by the Vice-Chancellor, in the course of his opinion, that the rule requiring the life tenant to pay the taxes, ought not to apply to those extraordinary taxes levied for municipal improvements and permanently beneficial to the land, known as assessments. The matter has been regulated in New York by the act of May 26, 1841, § 1, Laws of 1841, ch. 341, according to the terms of which the amount of the assessment is divided equitably between the life tenant and the remainder-man, *Fleet v. Dorland*, 11 How. Pr. 489; *Stillwell v. Doughty*, 2 Bradf. 311; *Estate of Miller*, 1 Tuck. 346; *Gunning v. Carman*, 3 Redf. 69. The same rule has been adopted elsewhere independently of any statute, and certainly is accordant with the rule of equity, *Qui sentit commodum sentire debet et onus*. In *Plympton v. Boston*, 106 Mass. 547, the Court says: "Assessments for permanent improvements must be treated as an incumbrance to which the life tenant must contribute to the extent of the interest during his life on the amount paid at his death. . . . Strict adherence to this rule would require the tenant for life to pay interest annually, though for convenience the value of such an annuity is usually paid at once."

This rule of contribution must be confined to cases of assessments for permanent improvements, and therefore, where the improvement required by a local ordinance or statute is of such character that, from its nature, it will require frequent renewals, the expense of such improvement must be borne by the life tenant alone, *Hitner v. Ege*, 23 Pa. St. 305.

In the case of *Whyte v. Mayor and City of Nashville*, 2 Swan 364, the distinction above noted between the widow's obligation as to ordinary taxes and as to assessments for permanent improvements seems to have been ignored by the Court. In that case, counsel argued that the city's claim for permanent improvements should have been brought against not only the life tenant but the remainder-man. The Court, however, took no notice of the argument in its opinion, and seemed, so far as it spoke of the widow at all, to regard her as, at least, primarily liable for the entire amount of the assessment; the case, however, went off on another point, viz., that the notice required by law had not been served by the proper officer.

Life Tenant not Bound to Insure.

The life tenant is not bound to insure the premises for the benefit of the remainder-man, but where insurance is desirable each should pay for the insurance of his respective estate, *Ex'rs of Kearney v. Kearney, supra*. In case of the partial destruction of the insured premises, either the life tenant or the remainder-man has the right to require the insurance money to be applied to the repair of the property, *Brough v. Higgins*, 2 Gratt. 408; in case of a total loss, the fund, arising from a general insurance, is substituted for the destroyed property, and the life tenant will be entitled to the interest for life, and the remainder-man to the principal, *Haxall's Ex'rs v. Shippen*, 10 Leigh 536; *Graham v. Roberts*, 8 Ired. Eq. 99.

Waste.

At common law the tenant for life was not liable for waste, but this liability was placed upon him by the statute of Marlebridge, 52 H. 3, c. 23, which gave the right to the owners of the inheritance to recover damages for the waste committed, and by the statute of Gloucester, 6 Ed. I., c. 5, which gave the right to recover the place wasted with treble damages.

In this country the liability of the tenant for life for waste, unless made expressly unimpeachable therefor, has been generally recognized, *Johnson v. Johnson*, 18 N. H. 594; *Sackett v. Sackett*, 8 Pick. 314; *Chase v. Hazelton*, 7 N. H. 171; *Miller v. Shields*, 55 Ind. 71; *Smith v. Daniel*, 2 McC. Eq. 143; *Neel v. Neel*, 19 Pa. St. 324; *Dejarnatte v. Allen*, 5 Gratt. 499, and this liability will extend to the alienee of the tenant for life, *Dejarnette v. Allen*; but the commission of waste by the life tenant will not enable the remainder-man or reversioner to recover the place wasted in ejectment, such a recovery being attainable only by the action of waste, *Patrick v. Sherwood*, 4 Blatch. 112; *Robinson v. Miller*, 2 B. Mon. 284.

It is waste, and the life tenant must account therefor, to cut wood except for the purposes of estovers, *Phillips v. Allen*, 7 Allen, 115; *White v. Cutler*, 17 Pick. 248; *Cook v. Cook*, 11 Gray 123; *Sargeant v. Towne*, 10 Mass. 307, and it is no defence to show that a quantity of fire-wood, equal in amount to the wood taken away, was brought upon the premises, *Phillips v. Allen*. Under some circumstances, however, it will not be waste to cut timber, as where the land in which the life estate is, is timber-land, and derives its value therefrom, as in *Williard v. Williard*, 56 Pa. St. 119, where AGNEW, J., said: "In considering the question of waste by a life tenant, respect must be had to the nature of the property. Here the evidence proves clearly that the tract was bought by Jacob and John as timber-land, that this was its chief

value, and that they were both engaged in cutting and rafting timber from it. The timber was the intended source of profit, and the parties treated it accordingly." Where there is a right to work mines there is also the right to use the timber necessary for that purpose, *Neel v. Neel*, 19 Pa. St. 324; *Findlay v. Smith*, 6 Munf. 134; and it has also been held, it is not waste for a tenant for life to cut wood for the purpose of clearing the land for reasonable cultivation, *Hastings v. Crunckleton*, 3 Yeates 261; *Lynn's Appeal*, 31 Pa. St. 44, and on a petition of the tenant for life, it has been referred to a master to ascertain whether cutting of timber would be for the benefit of the estate, *Bennett v. Danville*, 56 N. H. 216.

As we have seen (*ante*, pp. 206, 207), it is not waste for a tenant for life to work mines already opened, even to exhaustion, but it is waste if he open new mines.

The privileges of a life tenant are much greater in this country than in England, and in all cases of waste the presumption is in favor of the life tenant, and must be overthrown by clear testimony.

In a proper case a court of equity will issue an injunction to restrain a life tenant from committing waste, since equity regards a life tenant in the light of a trustee for those in remainder, *Smith v. Daniel*, 2 McC. Eq. 143; *Smith v. Poyas*, 2 Dess. 65; *Sarles v. Sarles*, 3 Sand. Ch. 601.

[On the subject of Waste in general, see *post*.]

Conveyance by Tenant for Life.

The tenant for life may convey his own estate or any less estate created out of it, *Jackson ex d. Murphy v. Van Hoesen*, 4 Cow. 325.

It was formerly held that a conveyance by the tenant for life, in fee, worked a forfeiture of his life estate, but this rule was confined to cases in which the conveyance was a feoffment with livery of seizin, a common recovery or a fine, and did not apply to conveyances under the statute of uses, *Pendleton v. Vandevier*, 1 Wash. (Va.) 381; *Bell v. Twilight*, 22 N. H. 500; *Jackson ex d. McCrea v. Mancius*, 2 Wend. 357; but it was, at a quite early date, denied that the rule of forfeiture was the law in parts of this country. In *Martin v. Sterling*, 1 Root 210, the Court said that "the forfeiture by granting a greater estate than he hath in the lands is borrowed from the feudal system, but, by the law of reason and common sense, and the law of this State, a man's deed shall be good and valid for so much as he hath right to, and void for the rest," and in *Rogers v. Moore*, 11 Conn. 553, the same doctrine was enunciated and enforced, HUNTINGDON, J., saying: "The principles on which the English law of forfeiture is founded are as inapplicable

to our condition and circumstances as they are, in the consequences resulting from them, unjust and inequitable.”

Even where the decided ground above maintained has not been taken, yet there has always been in the courts of this country a tendency so to construe the deed of a tenant for life as to avoid a forfeiture—thus in *Jackson ex d. Murphy v. Van Hoesen, supra*, it was decided that a conveyance by a tenant for life without any words of limitation to a natural person will be held to be a conveyance for the life of the grantor for that estate he might legally grant, and in *Jackson ex d. McCrea v. Mancius, supra*, where the life tenant made a deed in fee, it was held that a life estate only was conveyed, it not appearing from the deed that a tortious conveyance had been made, and SAVAGE, C. J., declared that the Court would never presume a conveyance to have been made by feoffment.

At the present day the rule may be said to be that the effect of a deed by a tenant for life, purporting to give a greater estate than that of which he is seized, will be to pass an estate for the life of the grantor, and to be void for the residue, *McCorry v. King's Heirs*, 3 Humph. 267, and a conveyance by life tenant in fee will not affect remainders, although in form contingent, *Smith v. Cooper*, 59 Ala. 494.

Tenant for Life not Permitted to set up Outstanding Title against the Owner of the Fee or to claim the Fee by Matter of Record.

A tenant for life will not be allowed to purchase an outstanding adverse title, and set it up against the reversioner or remainder-man, *Caufman v. Presbyterian Congregation of Cedar Spring*, 6 Binn. 59; and at common law it involved a forfeiture if the life tenant claimed the fee of record; it has been held, however, that such a claim made in the course of an equity proceeding would not work a forfeiture, a court of equity not having formerly been a court of record. Forfeiture also followed from an admission that the reversion was in a stranger, or from accepting it as a gift from him, but this does not appear to be law in the United States. In *Rosseell v. Jarvis*, 15 Wisc. 571, it is said by PAINE, J., “Under the common law rule, that if the tenant for life or years admitted of record that the fee was in a stranger, he forfeited his estate, and the authorities show that such was the common law rule. But no case was referred to, and we have not been able to find anywhere the doctrine was ever adopted in this country.” The Court declined to decide whether the rule were law in this country or not, but held that, at all events, it would not enforce it in any case which did not come strictly within its letter, and therefore held that the acceptance of a deed from a stranger, and putting it upon record,

would not be held equivalent to admission of record so as to work a forfeiture.

Conditions attached to Life Estate.

Conditions which will work a forfeiture may be attached to the gift of a life estate; the condition must, however, be clearly expressed, as in case of any doubt the life estate will be upheld, see *Craig v. Watt*, 8 Watts 498; in cases where the estate is created by devise, the following rule, laid down by TURNER, V. C., in *Rochford v. Hackman*, 9 Hare 481, is cited with approbation by the Supreme Court of Tennessee, in *Scruggs v. Murray*, 2 Lea 44: "The true rule I take to be this: the Court is to collect the intention of the testator, whether his intention was that the life interest should not continue; and it is to collect the intention from the whole will, looking to the primary disposition for the purpose of seeing to what extent the interest is given, and to the ulterior disposition for the purpose of seeing to what extent and in what events the primary disposition is defeated. If, on the one hand, the Court, upon this examination, finds that there is a limitation over, and that *it meets the event* which has occurred, it is plain that the testator did not intend the life estate to continue in that event, and it ceases accordingly; but if, on the other hand, the Court, upon examination, finds that the limitation over does not meet the event which has occurred, there is no evidence of the testator's intention that the life interest should not continue in that event, and it therefore continues."

Partition by Tenants for Life.

Tenants for life cannot make partition so as to bind those in remainder, *Austin v. Rutland R. R. Co.*, 45 Vt. 215.

Valuation of Life Estate.

It frequently becomes an object of some importance to ascertain the value of a life estate, either for the purpose of dividing equitably the proceeds of land when sold, between the life tenant and the remainder-man, or for the purpose of ascertaining in what proportions a burden, chargeable upon both, should be borne by each. Of course, the real and absolute value of a life estate cannot be accurately determined until after its termination, and the best that can be done is to arrive at an approximation to its value.

The question of the valuation of a life estate came before the Court of Chancery in England as early as the year 1661, and the Court valued the

life estate and the remainder at respectively one-third and two-thirds of the fee, *Rowel v. Sharp*, 1 Ch. Rep. 219. This proportion was persisted in until 1718; see *Cornish v. Mew*, 1 Cas. Ch. 271; *Brent v. Best*, 1 Vern. 70; *Clyat v. Batteson*, Id. 404; *Thynn v. Duvall*, 2 Id. 117; *Ballet v. Spranger*, Prec. Ch. 62; *Flud v. Flud*, 2 Freem. 210; *Lock v. Lock*, 2 Vern. 667; with an exception in 1692, where, in a decree apportioning the burden of paying off an incumbrance, the court directed that the remainder-man pay three and the life tenant two fifths, *James v. Hales*, 2 Vern. 267. The cases seem to have been decided by an adherence to an arbitrary rule, without taking into consideration the condition and health of the life tenant, and other circumstances which would render probable the greater or less continuance of the life estate. In 1718, in *Freemoult v. Dedire*, 1 P. Wms. 429, the Court ordered an estimate of the value of the life estate to be made, based upon the probability of life of the life tenant. This was followed in later cases, and in 1785 the one-third rule was put aside as unjust, and the valuation with reference to probability of life declared to be a proper rule, *Nightingale v. Lawson*, 1 Brown C. C. 440. For the purpose of ascertaining the probability of life, the various tables of mortality and expectation of life, such as Halley's, Price's, the Northampton and Carlisle tables were used. See *Heathcote v. Paignon*, 2 Br. C. C. 167; *Griffith v. Spratley*, 1 Cox 389; *Stone v. Theed*, 2 Br. C. C. 243; *White v. White*, 4 Ves. 24; *Penrhyn v. Hughes*, 5 Id. 107.

In this country various methods have been used, and various systems of calculation adopted, to determine the value of a life estate. In *Garland v. Executors of Crow*, 2 Bailey 24, the Court considered a life estate worth seven years' purchase, and, to arrive at its value, said that interest should be computed on the value of the fee for seven years, and perhaps interest on the several sums of annual interest from the time of the estimation, which should be deducted. From an early period the courts, however, took into consideration the probabilities arising from all sources; thus, in *Cassanave v. Brooke*, 3 Bland 267 (note), the Chancellor took into consideration the age and health of a widow as ingredients of valuation of her life estate. This was followed in *Greenwood v. Clarke*, Id. 268 (note), and in *Dorsey v. Smith*, Id. 271, the Chancellor having adopted the computation of life contained in the Halley tables, his decree was reversed, and the rule in *Cassanave v. Brooke* applied. In Maryland a table or sliding-scale of valuation of life estates has been adopted by the Court, varying from the case of a healthy person under thirty years of age, whose estate is valued at one-half of the fee, to that of a healthy person over seventy-seven, whose estate is valued at three-twentieths. See *Williams' Case*, 3 Bland 221, and the instructive opinion therein.

The mortality tables are generally regarded as not authoritative, but as assistants in estimating the value of a life estate, *Greer v. Mayor of New York*, 1 Abb. Pr. N. S. 206; *Sagar v. Eckert*, 3 Bradw. 412; *Gunning v. Carman*, 3¹ Redf. 69; *Shippen and Robbins's Appeal*, 80 Pa. St. 391, and the general rule here is that regard must be had to all the circumstances of the case—the health, age, and habits of the life tenant, the rental value of the land, the amount of taxes and probable cost of repairs—in estimating the value of the life interest. See cases, *supra*, and *Swaine v. Perine*, 5 John. Ch. 482; *Jones v. Sherrard*, 2 Dev. & B. Eq. 179; *Carnes v. Polk*, 5 Heisk. 244. In *Atkins v. Kron*, 8 Ired. Eq. 1, RUFFIN, C. J., stated as a difficulty in the way of ascertaining the value of a life estate the fluctuation in the price of land to which some parts of the country are especially liable.

As to the proper time at which the value of the estate should be taken, the rule is that the value of the life estate should be taken as at the time the burden fell upon the estate, or the conversion thereof into money took place. This rule has sometimes been enforced where its application resulted in a failure of justice. Thus, in *Foster v. Hilliard*, 1 Story 77, land in which there was a life estate was sold, and, before distribution of the proceeds, the life tenant died. It was contended by those in remainder that he was only entitled to the exact amount of the interest of the principal for the time during which he actually lived; but STORY, J., said, "I think it [the apportionment of the fund] must be according to the value of the life of the tenant for life at the time of the sale, according to the common tables. If I am right in the opinion already stated, that the rights of the parties were absolutely fixed at the very time of the sale, then it follows, as a necessary consequence, that they are entitled to share in the proceeds according to the relative values of their respective interests in the estate at the time of the sale. . . . It strikes me, therefore, that the true rule in the present case is to apportion the purchase-money between the tenant for life and the remainder-men according to the relative values of their respective estates at the time of the sale, unaffected by the subsequent events. It is said that the duration of the life of the tenant for life, calculated according to the common tables, was over twenty years, whereas he died in a little less than four years after the sale. Be it so. The event has turned out unfortunately for the remainder-men, as contingent events sometimes do. But the tenant for life might have lived thirty years, and then the apportionment would have been favorable to them. The fact, therefore, does not shake the propriety of the rule of apportionment, but it only shows that it has the common elements of uncertainty belonging to all calculations of contingencies. A tenant for life of a mortgaged estate may die within a year after he has been compelled to pay one-third part of the mortgage-money,

upon a decree for redemption, his life having been calculated as worth that proportion of the money. He may, on the other hand, live far beyond the period of average life. Yet the inequality has never been supposed to justify any departure from the general rule of contribution."

Now, with all deference to so great a name as that of the learned judge whose opinion we have just quoted, the above does not seem right. It is true the rights of the parties were absolutely fixed at the time of the sale; but what was the right of the life tenant? It was to receive so much as his life estate was actually worth. If any calculation was to be entered into to ascertain that amount, it was because, owing to the uncertainty of human life, the absolute value could not be then fixed, and for the purpose of settling accounts, and of making a speedy distribution, an approximate value, arrived at through the doctrine of chances, was allowed by the law to be taken; but when before distribution, and before decree therefor, the actual value of the life estate became fixed, absolutely and certainly, through its effluxion, then the reason for remaining satisfied with an approximation, or of having an approximate valuation made at all, failed, for the court was then able to say with certainty what was the exact sum to which, at the time of sale, each party became entitled. It seems, therefore, to us that the court went very far in upholding a rule, and that the action of the court in *Gunning v. Carman*, *supra*, was more in accordance with the rules of equity. In that case it was necessary to determine the proportion of an assessment for permanent improvements to be borne by the estate of a life tenant who had died. The Surrogate said: "The probabilities arrived at by the Northampton tables are only approximate, and adopted from the necessities of the case, and in particular instances do obvious injustice. In this case the uncertainty of the tables need not be incurred, as all uncertainty has been providentially resolved by the death of the life tenant. It is true that sometimes equity adjudges a thing to have been done when it ought to have been done, but such a principle should never be invoked to produce an inequitable result, and certainly any resort to the tables which would impose upon a life tenant the payment of interest for a longer period than he actually enjoyed the estate would be inequitable, and charging him for the use of what he did not enjoy, for the benefit of the remainder-man who did enjoy it.

"Regarding the assessment as an incumbrance on the premises, for the permanent benefit of the estate, equity seems to require that the life tenant should pay interest upon the incumbrance during the term of his enjoyment, and no longer."

Estate by the Curtesy.

**JACKSON EX DEM. SWARTWOUT AND WIFE v.
JOHNSON.**

SAME v. BRAINARD.

Supreme Court of New York, August Term, 1825.

[Reported in 5 Cowen 74.]

A, in 1787, was vested by act of the Legislature, with certain lands in fee, in trust for B, a female infant and others, he having power to sell, etc. On the 12th May, 1790, he contracted by his attorney, to sell a farm to R, on his (R's) paying, etc.; and R took possession under the contract, and began to improve the land; but soon assigned his contract to J, who, in 1790, succeeded him in the possession. B, the male *cestui que trust*, being still an infant, intermarried with C, April 7, 1792; and on the 5th November, of the same year, A conveyed all the trust property, (including the land contracted for by R,) to the *cestui que trust*. Afterwards, December 13, 1793, A, the trustee, by his attorney, conveyed the fee to J. During the same year, but at what time in the year it did not appear, B had issue a son born alive by her husband C; and afterwards, September 30, 1795, a daughter. B died in July, 1797, having attained the age of twenty-one, C, her husband, surviving. The son died intestate and unmarried, in 1816; and his father, the husband of B, died in 1817, the daughter surviving. On ejectment, *ex dem.* the daughter against J, who had held claiming title, from the date of his deed, of December 13, 1793; *held, first*, that his possession *was not* adverse, so as to avoid the deed to the *cestuis que trust*, for champerty or maintenance; *secondly*, that his possession *was* adverse, from the date of his deed; but *thirdly*, as B, the owner, was then under disability, both of infancy and coverture, the statute of limitations should not run against her, till both these disabilities were removed; that she, or her heirs, should have, in any event, ten years after the removal of her disabilities, and at least twenty years after the adverse possession commenced, within which to enter or bring ejectment; and *fourthly*, that C was tenant by the curtesy whether the adverse possession or disseizin took place before or after issue of the marriage; and *fifthly*, that this suspending the right of entry or action, of her heirs, they had yet ten years, within which to bring ejectment, after the estate by the curtesy terminated by the death of her father in 1817.

It seems, that a conveyance in fee, to one in trust for others, coupled with power to sell or mortgage, for the purpose of reimbursing to the trustee, certain moneys to be expended about the trust property, does not carry the possession or legal estate to the *cestui que trust* by virtue of the statute of uses.

It seems, that where A contracts to convey land to B, on certain conditions being performed, and afterwards conveys accordingly, this is evidence that the previous conditions were performed by B.

A possession and claim of land, under an executory contract of purchase, is not such an adverse possession as will render a deed from the true owner void for champerty or maintenance; nor is it such an adverse possession as if continued for twenty years, will bar an entry, within the statute of limitations; and especially, it is in no sense adverse, as to the one with whom the contract is made.

To constitute an adverse possession, it must not only be hostile in its inception, but the possessor must claim the *entire title*; for if it be subservient to, and admit the existence of a higher title, it is not adverse to that title.

Yet, *it seems*, that where one enters under a contract for a deed with A; and afterwards takes a deed from B, his possession from this time is adverse to A, and if continued for twenty years, will bar A's entry.

The disability which entitles a party to the benefit of the *proviso* in the statute of limitations, must exist when the right of entry or action first accrues; and if several disabilities exist together, the statute does not begin to run until the whole are removed.

If several disabilities exist together, in the owner of an estate, as infancy and coverture, when the adverse possession commences against her, she, or if she die, her heirs, have at least ten years within which to enter or bring an action, after both disabilities are removed; and they are entitled to full twenty years, for this purpose, from the time when the adverse possession commenced. Thus, if the disabilities should be removed within three years after the adverse possession commenced, they would not be barred under seventeen years. So if the disabilities should not be removed till twenty years after the adverse possession began, they would still have ten years to enter or bring ejectment. And thus, thirty years' adverse possession, or more, may be necessary to bar an entry or ejectment.

And though these disabilities be removed, if the right of entry or ejectment be suspended by the intervention of a particular estate, existing at the time of their removal, as a tenancy by the curtesy, *initiate*, during their existence, and *consummate eo instanti* that they determine, the owners still have ten years to enter or bring ejectment, after the particular estate determined.

Cumulative or successive disabilities, such as are mentioned by the *proviso* in the statute of limitations, are not allowed to stand in the way of the

statute ; but the intervention of a particular estate is not within the rule. Thus, if the disseizin happen during infancy and coverture, and afterwards, before or at the determination of these disabilities, an estate by the curtesy intervene, it is not within the rule ; but the rightful owner shall have yet ten years to enter or bring ejectment, after the estate by the curtesy is determined.

The statute of limitations does not run against remainder-men or reversioners, during the continuance of the particular estate. It was aimed at those who may be guilty of laches in omitting to enter or bring actions ; which cannot be said of remainder-men and reversioners, who have no right in law to do either. And this, whether the particular estate exist at the time of the disseizin, or arise subsequently, provided that in the latter case it be immediately preceded by a disability or disabilities within the *proviso* of the statute.

Four things are necessary to constitute a tenancy by the curtesy : marriage, seizin of the wife, issue and death of the wife. But it is not necessary that seizin and issue should concur together at one time ; and therefore, if the wife become seized of lands during the coverture, and then be disseized, and then have issue, the husband shall be tenant by the curtesy of these lands ; and on his wife's death may enter as such ; and, during her life, he is called tenant by the curtesy initiate. So if the wife become seized after issue, though the issue die before her seizin.

As to what shall amount to a seizin ; it is enough that the wife have a tenant in possession, who holds at will, or who entered under a contract to purchase her estate.

And it seems, that the rule which requires actual seizin, applies only to cases where it is not complete till entry ; as where the estate comes to the wife by descent or devise, not where it comes by purchase, and is transferred into possession by the statute of uses.

The lessor of the plaintiff sworn as a witness, at the circuit, without objection, in order to prove the loss of a deed.

EJECTMENTS, to recover an undivided fourth of part of lots 5 and 10, in Colden's tract, in Croghan's patent, in the town of Burlington, in Otsego county, tried at the circuit in that county, September, 1823, before NELSON, C., Judge.

It was admitted that Cadwallader Colden and David Colden were, on the 15th of March, 1770, seized of 1843 acres of land, of which the premises in question were a part.

The plaintiff gave in evidence, a deed from Cadwallader Colden to David Colden, dated December 12, 1775 ; and by which, lots 5 and 10, with others, were released to David Colden.

It was admitted that David Colden's name was in the act of attainder of 1779.

The plaintiff's counsel then read in evidence, an act of the Legislature, passed April 21, 1787; the first section of which, vested the estate of David Colden, not already sold in Cadwallader Colden, his heirs, executors and administrators, *in trust for the children of David Colden*, and authorized Cadwallader Colden to bring actions for the recovery of the property in his own name.

The second section was in the form of a *proviso*, that Cadwallader Colden should pay into the treasury, in three months, such sums as the land should be appraised at, and deliver to the surveyor-general certain papers belonging to his office and make a certain affidavit.

The third section directed the commissioners of forfeitures, to have the lands mentioned in a certain location, of the lands of David Colden, made by Cadwallader Colden, appraised; and authorized Cadwallader Colden, when the terms of the act should be complied with, to sell or mortgage enough of the land to repay himself any money he might have advanced.

The plaintiff's counsel then read in evidence, an act of the Legislature, passed January 17, 1789, by which the time of payment to the estate was extended.

He then read in evidence, a copy of a paper from the comptroller's office, a certificate from the surveyor-general, and an affidavit made by Cadwallader Colden, before the Chief Justice, by which it appeared that the conditions of the act of 1787 had all been complied with.

He further read a deposition of Cadwallader D. Colden, taken by consent, by which it appeared that David Colden died in the year 1784, leaving five children, viz. Cadwallader D. still living, Alice Criste, Mary, Elizabeth Anne, and Catharine. Alice Criste was born in 1768, and died intestate, in 1788, without having been married. Mary was born in 1770, married J. O. Hoffman, and died in 1797, leaving children. Elizabeth Anne was born in 1774, was married to E. W. Laight in 1799, and died intestate, in 1800, without having had a child.

That Catharine, the fourth daughter, was born November 20, 1775, married Thomas Cooper, April 7, 1792, and died intestate, in July, 1797, leaving her husband, Thomas Cooper, and a son Colden, and a daughter, Alice Anne, by him, living.

That Alice Anne was born September 30, 1795, and married 22d

December, 1814, to Samuel Swartwout, who, with Alice Anne, his wife, are the lessors of the plaintiff.

That Colden Cooper was born in 1793, and died intestate without having been married, on the 21st of November, 1816. Thomas Cooper died in November or December, 1817.

It also appeared from this deposition, that Cadwallader Colden, the trustee under the act of 1787, on the 5th of November, 1792, gave the deponent (the son of David Colden) a deed for his undivided fourth of the trust lands, (which deed was produced,) and also that Cadwallader Colden, on the same day executed to Catharine Cooper, the fourth daughter of D. Colden, a deed for her undivided fourth part. Also, that Catharine Cooper's deed was, in all respects, similar to the deed produced. That these deeds were intended as a full execution of the trust.

The witness recollected the place where the deeds were signed. It was at Mr. Hoffman's. The parties assembled there for the purpose. A copy of this deed was annexed to the case.

The deposition also stated, that long previous to the execution of these deeds, and as early as 1790, Cadwallader Colden, the trustee, had been paid for all his advances, out of moneys of the children of David Colden, received from England; that none of the trust lands were sold to raise this money, or for the repayment of any money raised for this purpose; that Cadwallader Colden never pretended to have any claims on those lands after this money from England was received and paid.

The money from England was received in the months of February and June, 1790. In the deed from Cadwallader Colden, the trustee, to Cadwallader D. Colden, there was an exception, as to the Otsego lands, in the covenant, that he had done nothing to encumber or impair the title. This, (as appeared from the deposition,) as the deponent understood, was because some of these lands had been sold by William Cooper, of Cooperstown.

S. Swartwout, the lessor, was sworn as a witness, and proved the loss of the deed from Cadwallader Colden the trustee, to Catharine Cooper.

It was admitted that the defendant, in the first cause, was in possession of part of No. 10, and the defendant in the second cause, of part of No. 5, and lease, entry and ouster in both causes were confessed. The plaintiff then rested.

The defendants then gave in evidence a power of attorney from Cad-

wallader Colden, the trustee, to William Cooper, of Cooperstown, dated January 30, 1790, authorizing William Cooper to sell his (Cadwallader Colden's) lands and also any lands Cadwallader Colden was intrusted with.

The defendant in the first cause then read in evidence an article or contract from William Cooper, as attorney for Cadwallader Colden, to one Matthew Rogers, dated 12th May, 1790, by which it was agreed, that if Rogers paid a certain sum of money by the year 1800, with interest annually, he should receive a deed for the whole of No. 10. This article is more particularly recited in the opinion of SUTHERLAND, J.

The defendant in the first cause proved that he, as assignee of the contract to Rogers, went on to No. 10, in 1790; that he built a log house that summer, and cleared a part of it; and had ever since been in possession, claiming it as his own. He also gave in evidence, a deed in fee from William Cooper, as attorney for Cadwallader Colden, to him, dated December 13, 1793, for the premises in question, given in pursuance of the article.

The defendant in the second cause gave in evidence a similar article to one T. Morse, and proved that one Giles, as assignee of Morse, entered in 1790, and cleared a part, and built a log house; that he continued there till 1794, and then sold to the defendant, who had continued in possession ever since, claiming the land as his own. He also gave in evidence, a deed in fee from William Cooper, as attorney for Cadwallader Colden, to himself, for the premises in question, dated January 6, 1795, executed pursuant to the article to Morse.

Verdicts were taken for the plaintiff for a fourth of the premises in question, subject to the opinion of the Court upon the above case.

J. O. Morse, for the plaintiff, made the following points:

1. The plaintiff has shown a perfect title in the lessors.
2. The defendants' possession did not become adverse, till after the death of Thomas Cooper, who was tenant by the curtesy.
 1. Title is shown in the lessors; for it is proved, *first*, that in 1770, D. Colden and C. Colden were seized in fee. *Secondly*, that in 1775, C. Colden released to D. Colden half the tract of which the premises in question are part. *Thirdly*, although the lands of David were forfeited by the act of 1779, the act of 1787 vests them in Cadwallader

Colden, in trust for the children of David. *Fourthly*, in 1792, C. Colden, the trustee, conveyed to Catharine Cooper, one of the children of David, her share, of which the premises in question are part. *Fifthly*, Catharine Cooper died in 1797, leaving her husband, Thomas Cooper, survivor, who was tenant by the curtesy. *Sixthly*, Thomas Cooper died in 1817, and the estate of Mrs. Swartwout then vested, her brother Colden having previously died.

2. The possession of the defendants, under the contracts to Rogers and Morse, was not adverse. *Jackson v. Camp*, 1 Cowen's Rep. 605.

It cannot be said that the deed from C. Colden to Mrs. C. Cooper, in 1792, was void for champerty. The case of *Jackson v. Bard*, 4 John. 230, is decisive on this point. The cases are exactly parallel. In the case of *Cooper v. Stower*, 9 John. 331, it was decided that a contract to sell and convey, does not even give a license to enter; but it was agreed that till the contract was executed by all the purchasers, and a certain bond given, no timber should be cut: and the Court say, that with this addition, the most that could be implied was a permission to enter and occupy as tenants at will, till the consideration-money was paid.

The defendants in these causes, then, while occupying under the contracts to Morse and Rogers, the consideration-money not having been paid, are to be considered, at most, no better than tenants at will, or *quasi* tenants at will, to C. Colden, or to his *cestui que trust*, Mrs. Cooper.

Their possession, then, did not destroy the operation of the deed to Mrs. Cooper, in 1792; and if this was an operative and valid deed, it is not necessary to inquire whether the trust created by the act of 1787 was executed by our statute of uses.

But it may be said, perhaps, that the defendants' possession became adverse when they took their deeds, the first in 1793, and the second in 1795.

For the sake of the argument, we are willing to admit that their possessions *did*, in their nature, become adverse; but it is denied that they began to *operate* against Mrs. Cooper.

We admit that there cannot be a succession of disabilities. We say, in the language of Kent, Chancellor, in *Demarest v. Wyncoop*, 3 John. Ch. Rep. 136, "If several disabilities exist together at the time the right of action accrues, (or at the time the adverse possession com-

mences), the statute does not begin to run until the party has survived them all."

In our cases, Mrs. Cooper was, at the date of the defendants' deeds, laboring under two disabilities, infancy and coverture.

In 1796 she became of age, and her disability as an infant, perhaps, then ceased; but her disability, as a feme covert, continued as long as she lived. This disability she did not *survive*. The statute, therefore, did not begin to run against her.

This is undoubtedly the true doctrine on this subject; and there is nothing that militates against it, except it be a mere dictum of Chief-Justice Swift, of Connecticut. 2 *Corin. Rep. N. S.* 33.

The rule laid down by Chancellor Kent, is supported by *Chambre, J., in Cotterell v. Dutton*, 4 Taunton 830.

If, then, the statute did not begin to run against Mrs. Cooper in her lifetime, the intervention of her husband's life estate, as tenant by the curtesy, would further prevent it, so that in fact it never began to run against Mrs. Swartwout, till after the death of her father.

A contrary rule would be the height of injustice. It would compel the reversioner to bring his suit during the continuance of the particular estate, which is impossible. *Jackson v. Schoonmaker*, 4 *John. Rep.* 402. 7 *East.* 311.

If the statute does begin to run, the *proviso* is a nullity. "If there be no right to enter during a particular estate, in such a case, the statute never attaches." *Ballantine on Lim.* 49.

Possibly, however, it may be contended that Mrs. Cooper was never seized of these lands, in such a manner as to constitute her husband a tenant by the curtesy.

The rule which now exists on this subject is, that there must be a constructive possession in fact. *Jackson v. Sellick*, 8 *John. Rep.* 271.

In 1792, C. Colden conveyed these lands to Mrs. Cooper. The persons then on the lands, as has been shown on the authority of *Cooper v. Stower*, 9 *John.* 331, were her tenants at will, or *quasi* such. She could have maintained trespass against them on the authority of that case. She had, therefore, a constructive seizin in fact.

In *De Grey v. Richardson*, 3 *Atk.* 469, curtesy was allowed in a case precisely like these. In *Sterling v. Pennington*, 7 *Vin.* 149, pl. 11, the wife was denied possession during the coverture, and yet curtesy was allowed.

Again; it will not be pretended but that from the year 1787, Mrs.

Cooper had a trust estate in these lands. The lands were then wild. An actual entry was not necessary. *Jackson v. Sellick*, 8 John. Rep. 271.

A husband shall be tenant by the curtesy of a trust estate of freehold in the wife. *Watts v. Ball*, 1 P. Williams 108. Cruise's Digest, Title XII., Trust, ch. 11, sec. 8, 9. *Chaplin v. Chaplin*, 3 P. Williams 229. Comyn's Digest, Estate, (D. 1.)

I. *Seelye* and *R. Campbell*, contra.

1. If the act of 1787 vested in the children of D. Colden, by the statute of uses, an estate in fee, or if it vested by the payment of the money to the trustees in 1790, the statute of limitations began to run against Mrs. Cooper before her marriage.

Giving the deeds to the defendants, is full evidence that every part of the contracts was performed. *Jackson v. Camp*, 1 Cowen's Rep. 605.

Where a possession is taken under a contract, and the contract consummated by a deed, the possession is adverse from the first. The possession being adverse in 1790, operated on the rights of Mrs. Cooper, then an infant.

The proviso in the statute of limitations saved her rights, until that disability was removed; but cumulative disabilities are not within the proviso. 18 John. 40. 3 John. Ch. Rep. 129, 138. 4 Taunt. 826. 6 East. 80. 4 Day 298. Plowden 353. 4 Mass. Rep. 182. 4 T. R. 300. 2 Com. Rep. 27.

If title first accrue to an infant sixteen years old, he is not within the proviso, nor obliged to bring his action in ten years after he comes of age; for in all cases a person has twenty years.

If Mrs. Cooper was seized in 1790, the statute began to run against her. She was of age in 1796. She and her heirs had fifteen years to bring an action. The statute having begun to run, no subsequent disability can stop it. 2 Conn. Rep. 27, 33, per Swift, Ch. J.

2. But if Mrs. Cooper was not seized till the date of the deed to her from C. Colden, in 1792, this deed gave her no right; for it was void for champerty. At the date of this deed, the defendants had been three years in possession under the contracts. C. Colden could sell nothing but a right of action.

If Mrs. Cooper would have been compelled to bring an action to get possession, the deed must be void; for such an action cannot be sold. It is directly in face of the statute, and void at common law. 1 Rev.

Laws, 172. 3 John. Cas. 101. 2 John. Cas. 41, 58. 5 John. Rep. 489. Co. Litt. 214. 11 John. Rep. 91. 9 Id. 55. The lessors, therefore, showed no right.

3. The adverse possession certainly began to operate on the execution of the deeds to the defendants. Mrs. Cooper was then an infant and covert. She was of age in 1796, and died in 1797. She had twenty years from the date of the defendants' deeds, and her heirs ten years from her death.

It does not appear from the case, that Mrs. Cooper had a child at the date of Johnson's deed (December, 1793). Of course, Thomas Cooper was not then tenant by the curtesy.

The case states that Colden Cooper was born in 1793; but the time in that year is not stated. The tenancy by the curtesy must have existed when the adverse possession commenced. It cannot arise during the existence of an adverse possession.

4. When the adverse possession commenced in *Johnson's case*, T. Cooper had not acquired even an inchoate right by the birth of a child. His life estate did not commence till the death of his wife in 1797, if at all. 1 Binney 10.

The *dictum* that the statute does not begin to run in such a case as this, is not correct. It can only be true, that the statute never runs out, and forms a bar during that disability, nor until ten years afterwards. Opinion of Ch. J. Swift, 2 Conn. Rep. 27, 33.

The statute did, therefore, begin to run, and the life estate of tenancy by the curtesy, not being in existence when the adverse possession commenced, will not stop the statute.

This, therefore, distinguishes the case from those of *Jackson v. Schoonmaker*, 4 John. 390, and *Jackson v. Sellick*, 8 John. 262.

5. The decisive answer to the plaintiff's claim is, that Thomas Cooper never was tenant by the curtesy. Here was no seizin in deed, and in fact. This is necessary. 1 Inst. 29, a. 1 Cruise 107, s. 10. Perkins 464, 470.

There has been no relaxation of this rule, except where lands are wild, as in *Jackson v. Sellick*, 8 Johns. 265. If, however, T. Cooper and wife should be deemed seized in law, that seizin was in trust for the defendants; and the husband of a female trustee cannot be tenant by the curtesy. 1 Madd. Ch. 268. 1 Cruise's Dig. 471, Title XII., Trust, ch. 1, sec. 30.

Where articles are entered into for the purchase of an estate, a trust immediately results to the purchaser. 3 John. Ch. Rep. 316. 1 Madd. Ch. 389, 390, 391.

D. Cady, in reply. It cannot be necessary to discuss the questions, whether the act of the 7th of April, 1787, created such a trust in C. Colden, as was executed in the children of D. Colden, by the statute of uses; nor, whether they became seized of the legal estate in 1790, when all the money which their trustee had advanced on account of the trust estate, was repaid. It is enough to show, that it was vested in them by their trustees on the fifth of November, 1792.

The husband of Mrs. Cooper, the *cestui que trust*, could not, even by his dissent, make void a deed executed by the trustee in pursuance of the trust. But there is no pretence that he dissented.

In 1 Inst., sec. 1, 3 a, it is said, "a feme covert is of capacity to purchase of others, without the consent of her husband: but the husband may disagree thereto and divest the whole estate; but if he neither agree nor disagree the purchase is good." The law, then, requires that the husband should do an act clearly manifesting his dissent to the purchase.

What are the facts which are supposed to prove the adverse possession upon which the defendants rely for a defence? Were it conceded, that on the 13th December, 1793, the possession of the defendants became adverse to all the world, and so continued from that time to the present, it would not furnish them with a shadow of a defence. Unless their possession was commenced in hostility to the title of C. Colden, and continued adverse down to the 5th November, 1792, when he executed a deed to Mrs. Cooper, his *cestui que trust*, no one of the objections taken by the defendant's counsel, and founded upon adverse possession, can be supported.

The Court say, in the case of *Smith v. Burtis*, 9 John. 180, "a possession for ever so long a time, stripped of the circumstance that it is accompanied with the claim of the *entire title*, will not amount to an adverse possession, barring those who have the real and legitimate title. The fact of possession and the *quo animo* it was commenced or continued, are the only tests; it must necessarily be *exclusive of any other right*." In the case of *Brandt v. Ogden*, 1 John. 158, the Court say, "in order to bar the recovery of a plaintiff who has a title by a possession in the defendant, *strict proof* has always been required, not only

that the first possession was taken under a claim *hostile to the real owner*; but that such hostility has continued on the part of the succeeding tenants."

In these cases, the Court were speaking of such an adverse possession, as would, if continued twenty years, bar the person having title; but the possession which will make void a deed executed by a person having the title, must be of the same character. Suppose Johnson had remained in possession twenty years, as assignee of the contract to M. Rogers; would that possession have protected him against an ejectment brought by C. Colden? Could he have alleged that he entered claiming the fee in *hostility* to the title of C. Colden? So far from this, C. Colden, on the trial of such ejectment, need not have given any other evidence of his title, than the contract to Rogers, and proof that the defendant entered and claimed as assignee of that contract. *Jackson v. Dobbin*, 3 John. 223. *Jackson v. Reynolds*, 3 Caines 444.

The counsel for the defendant have introduced what is deemed a new *test*, in order to determine whether a possession be or be not adverse. They assume that if the defendant had committed such an ouster or disseizin as would compel C. Colden, or the children of D. Colden, to bring an action to get possession, then the deed must be void! Indeed! is this the rule? A tenant at will or at sufferance, if he be obstinate, cannot be turned out of possession but by action; and is it to be taken for granted, that he will be obstinate; and that his possession renders it unlawful for his landlord to sell the estate? The law requires strict proof in order to show that a possession is adverse. Without such proof, the possession is always presumed to be in subordination to the title, and to be held for the rightful owner. 9 John. 166, 7. 3 John. Cas. 124.

The case of *Jackson v. Bard*, 4 John. 231, bears directly upon the point under discussion; and in the case of *Jackson v. Camp*, 1 Cowen 610, the Court say, "that the agreement (to purchase) had not placed Dyer in a situation to commence holding adversely, until he had performed the condition." When Johnson, as the assignee of the agreement with Rogers entered, it was altogether uncertain whether he ever would perform the conditions upon which the agreement would take effect, and there is no evidence in the case that he ever did pay a cent before the deed of the 5th November, 1792, to Mrs. Cooper. He did not enter claiming *title* in himself, but claiming the title to be in C. Colden, from whom he intended to acquire it.

A deed given in December, 1793, by C. Colden, can furnish no evidence that the article of sale was performed, against his grantee, in a deed given in November, 1792. Besides, the agreement was for the conveyance of 525 acres of land; and the deed is for but 100 acres. It is idle, therefore, to say that the deed was given in pursuance of the contract, or that it furnishes evidence that the contract was performed. It is rather evidence, that the agreement with Rogers was abandoned, and a new agreement substituted in its stead. It cannot, however, be important whether the defendant did, or did not perform the agreement under which he entered. Suppose he had regularly paid the interest up to the time when C. Colden conveyed to Mrs. Cooper, would such payment have rendered his possession adverse, so that C. Colden could not give a valid deed to his *cestui que trust*? If C. Colden had been seized of the land in his own right, and covenanted to convey it to the defendant in the year 1800; and the defendant had paid the interest to November, 1792, C. Colden might have been considered a trustee for the defendant; and had C. Colden then given a deed to another, the deed would have passed a valid title at law, but the purchaser might have been charged with the trust, and compelled in a Court of Equity to convey the land to the defendant. But in this case, C. Colden was trustee for the children of D. Colden, before he made any agreement with the defendant's assignor, Rogers. There is good reason for saying, that the defendant purchased with notice of that trust. The papers which the defendant would have to produce, to show his own title, would prove the trust. *Hamilton v. Royce*, 2 Sch. and Lef. 315. But whether he is chargeable with notice of the trust or not, Mrs. Cooper had the first equity, and the first title at law.

But suppose the agreement made by William Cooper with Rogers, was a valid agreement, as against the children of D. Colden; neither C. Colden nor his attorney could, after he had conveyed the estate to his *cestuis que trust*, give a valid deed to Johnson. The defendant should have looked to them for a title.

The statute against champerty and maintenance has no application to a deed given by a trustee to his *cestui que trust* in pursuance of the trust. Their titles constitute but one, and it must be immaterial, as to other persons, whether their titles be united in one person or not. There can be no danger, that a *cestui que trust* will purchase in his own title *at an under value*, for the purpose of litigation or oppression. The intent of

the statute, was "to restrain all persons from transferring any disputed right to strangers." 3 Bac. Abr. 326, Maintenance. "Whoever has a reversion or remainder vested in him, may lawfully take any conveyance which will strengthen his estate." May not a *cestui que trust* do the same?

Why did the execution of that deed to Mrs. Cooper give the character of hostility to the defendant's possession? If the defendant, when that deed was executed, was in possession, admitting the title of C. Colden, and intending to purchase that title, he did not commence to hold in hostility to it, the moment it was transferred to Mrs. Cooper. No; he continued to hold under the same title, as her tenant at will.

To support their branch of the argument upon the statute of limitations, the defendant's counsel are driven to the necessity of insisting, that T. Cooper was not tenant by the curtesy. So confident are we, that T. Cooper was tenant by the curtesy, and that, during his life, the descent to the children of Mrs. Cooper was suspended, that I do not deem it necessary to examine whether the construction put upon the statute of limitations by the defendant's counsel, be or be not correct.

The law is not, that to make the husband tenant by the curtesy, the seizin of the wife must be after the birth of issue. 1 Cruise's Dig. 107, chap. 1, sec. 11. Id. 113, s. 25. The time when the seizin of the wife commences, whether before or after issue had, is immaterial. Thus, Lord Coke says, 1 Inst. 30, a, "If a man takes a woman seized of lands in *fee* and is disseized, and then has issue, and the wife dies, he shall enter and hold by the curtesy. So if he has issue before the descent of lands upon his wife." These authorities are enough to show that it is wholly immaterial whether Colden Cooper was born before, or after the deed given to the defendant. Nay; if he had never been born, it would not have varied the right of the lessors.

The question is, was Mrs. Cooper, at any time during the coverture, so seized as to entitle her husband to be tenant by the curtesy? This question must be answered in the affirmative, unless Cadwallader Colden was so disseized, that he could not convey a legal title to his *cestui que trust*, Mrs. Cooper, on the 5th November, 1792. That he was not so disseized, has, it is believed, been sufficiently shown.

It requires the same seizin in the wife, to enable her heir to take by descent, as it does to entitle her husband to be tenant by the curtesy. 1 Cruise's Dig. 112, ch. 1, s. 24. A seizin in law is said not to be suf-

ficient for either purpose. A seizin in law, as distinguished from a seizin in deed, applies only to cases in which the title of the person claiming is not complete till entry. Thus, a person who claims as heir or devisee, has only a seizin in law, before entry; and if before entry, a stranger enters, it is an abatement, not a disseizin. 3 Bl. Com. 167. "In descents of land, which are cast upon the heir by the act of the law itself, the heir has not *plenum dominium*, or full and complete ownership, till he has made an actual corporal entry into the lands; and if he die before entry made, his heir shall not be entitled to take possession; but the heir of the person who was last actually seized." 2 Bl. Com. 312. But when a person claims under a deed or conveyance, to which effect is given by the statute of uses, "he is put at once into corporal possession of the land, without ever having seen it, by a kind of parliamentary magic." 2 Bl. Com. 338. In this case, Mrs. Cooper did not claim as heir, devisee, or feoffee, and there was no necessity that she should enter in order to enable her heirs to take, or her husband to be tenant by the curtesy. She claimed either under a legislative grant, or under a deed from her trustees, in either of which cases was entry necessary to give *plenum dominium*. The case put by Lord Coke, 1 Inst. 29, a, to show that the husband shall not be tenant by the curtesy, where the wife has only a seizin in law, is where lands descend to the wife, she has issue, and dies before entry. But the literal construction of this rule has been departed from, both in England and in this country. 1 Cruise's Dig. 110, sec. 16.

In the case of *Jackson v. Sellick*, 8 John. 262, the Court held that, as to lands, the possession followed the title, and that to entitle the husband to be tenant by the curtesy, it was not necessary that he should enter during the coverture. In the case of *Jackson v. Howe*, 14 John. 405, 406, the Court held that, as to wild lands, the heir need not enter in order to become the stock from which a descent might be claimed.

Here the possession of the defendant, was the possession of Cadwalader Colden, which was transferred to Mrs. Cooper, and she had a right to consider the defendant as holding for her. At all events, she had a right so to consider him, till he took a deed in 1793. And were it conceded that she and her husband were then disseized, and so continued till her death, it would present the very case, in which Lord Coke says, that the husband "shall enter and hold by the curtesy."

SUTHERLAND, J.—The lessors of the plaintiff made out a clear paper title to the premises in question ; and are entitled to recover, unless the deed from Cadwallader Colden to Mrs. Cooper, of the 5th November, 1792, was void under the statute of champerty and maintenance, or their rights barred by adverse possession.

The questions which arose in the suit of the same lessors against Cole,* whether the trust in favor of the heirs of David Colden, created by the act of 1787, was executed by the statute of uses, or if not, whether a conveyance from the trustee to the *cestuis que trust* was to be presumed, are excluded from this case ; because an actual conveyance from their trustee is proved ; and the first question which arises is, whether that conveyance was valid. It bears date on the 5th November, 1792 ; and it is contended by the defendant that it was void ; because, at the time of its execution, the premises in question, which, among others, it purported to convey, were in the actual possession of the defendant, under a contract of sale made between Cadwallader Colden, by his attorney *William Cooper*, and one Matthew Rogers, on the 12th day of May, 1790. It appears that the defendant, as the assignee of that contract, entered upon a *part* of the premises which it contains in the summer of 1790, made a small clearing, and erected a log house ; that on the 13th day of December, 1793, he took a deed from William Cooper, as the attorney of Colden, and has remained in the possession down to the time of the trial.

This, it is said, was an adverse possession from the time of the defendant's entry in 1790 ; but if not so, then, that it became adverse upon the receiving of his deed in 1793.

So far as the question of maintenance is concerned, it is not material whether the defendant's possession became adverse or not, upon receiving his deed in 1793. If the lands conveyed to Mrs. Cooper by the deed of November 5th, 1792, were not then held adversely to the grantor, the deed was not *void* on the ground of champerty and maintenance. The adverse possession must exist at the time of the conveyance, in order to avoid it. If the defendant's possession was not then adverse to Cadwallader Colden, under whom he entered, it was in judgment of law the possession of Colden ; and his conveyance would not be affected, either by the terms or the principles of the act against cham-

* 4 Cowen's Rep. 587.

perty and maintenance. In the view of that act, it would be valid, whatever might be its legal effect and operation.

Was the defendant, then, on the 5th of November, 1792, in possession of the premises in question, holding them adversely to Cadwallader Colden? By the contract with Rogers, he was to have a deed for his land from Colden, upon his paying him £262,10, with interest, annually, on or before the 12th day of May, 1800. The contract does not, in terms, authorize Rogers to enter upon the land. It contains no words of present demise. It recites that Rogers, by his obligation, bearing even date with the agreement, was indebted to Colden in the sum of £262,10, and covenants that in consideration thereof, the said Colden will convey to the said Rogers, the premises mentioned therein, if the said Rogers shall pay the said sum of £262,10, with interest, annually, on or before the 12th day of May, 1800. Rogers, therefore, or his assignee, was not entitled to a deed until the land was paid for. He did not enter, claiming the whole title. The contract itself admits the title to reside in Colden, and that it was to remain in him until Rogers' part of the agreement was performed. Now, admitting the deed to the defendant, given in 1793, to be evidence of performance on his part, it is evidence of performance only at the time it was given, and not at any antecedent period. In 1792, therefore, when the deed to Mrs. Cooper was given, the defendant had not performed, and was not entitled to a conveyance. Such a possession has never been considered adverse. In *Jackson v. Bard*, 4 John. 230, one Barton, in May, 1798, entered into articles of agreement with Dickenson and Harris, for the sale of certain premises. Soon after, one Smith purchased a portion of the premises from Dickenson by contract, and paid him \$25, and entered into possession. On the 8th March, 1799, Barton gave a deed to Dickenson, and took back a mortgage. Barton foreclosed the mortgage, and the lessor of the plaintiff became the purchaser, and took a deed from Barton on the mortgage sale. The tenant in possession under Smith forbid the sale, and it was contended that the possession of Smith was adverse at the time of the giving of the mortgage, so as to render it void and prevent its operation. But the Court held it not to be adverse to Barton's title. They say Dickenson could not have set up against Barton an adverse holding; and Smith, who claimed under him, must be considered as standing in the same situation.

In *Jackson v. Camp*, 1 Cowen 605, the same principle is distinctly

recognized. One Dyer made a contract for land with the agent of the proprietors in 1792, and entered under it. In 1794 he received his deed. In 1796 he sold a part of it to the defendant. It appeared that he took possession under his contract, of land which the deed did not cover, and the defendant sought to retain it, on the ground of adverse possession. The possession taken under Dyer's contract, was held not to be adverse on several grounds. But, among others, the Court say, the agreement (made by Dyer with the agent) "did not put him in a situation to commence holding adversely, until he performed the condition. The land still belonged to the proprietor of the township. Whether he ever would perform, was contingent. He entered on the lot, it is true, but it was necessarily subject to the right of turning him off, if he neglected to make full payment. The possession, therefore, when taken, had not the characteristics to constitute it adverse. It was not hostile in its inception. On the non-performance, Dyer would become liable to be turned out as a trespasser, and responsible in that character for the mesne profits." These observations are entirely applicable to this case, and are decisive of the question of adverse possession, at the time of the giving of the deed from Cadwallader Colden to Mrs. Cooper in 1792. That deed, therefore, was not void on the ground of champerty or maintenance.

A possession, in order to be adverse, must be accompanied with a claim of *the entire title*. If it appear that the title claimed is subservient to, and admits the existence of a higher title, the possession is not adverse to that title. *Smith v. Burtis*, 9 John. 180. Now, in this case, the agreement between Colden and Rogers, is an admission on the part of Rogers, that the legal title remained in Colden; for it provided for the conveyance of that title to Rogers at a future period, upon certain contingencies. If Rogers had not performed the agreement, it would have afforded all the evidence of title, which would have been necessary to enable Colden to recover the possession from him, in an action of ejectment. Colden might perhaps be considered as the trustee of Rogers, holding the legal estate in trust for him, upon performance on his part; and if Colden's estate in the land had been absolute and in his own right, and not in trust for the heirs of David Colden, his grantee would probably have taken it subject to the trust for Rogers, and might perhaps have been compelled in equity to convey. It may well be doubted whether, in a case like this, where the legal estate has been united to

the older equitable interest, chancery would interfere in favor of a younger equity. But that inquiry is irrelevant here; for in this action the legal title must prevail.

But if the defendant had not such an adverse possession on the 1st of November, 1792, as to render the conveyance to Mrs. Cooper, of that date, void, it is contended that his possession, at all events, became adverse to the lessors of the plaintiff on the 13th of December, 1793, when he received his deed from Cadwallader Colden; and that the claim of the lessors of the plaintiff is barred by the statute of limitations. It is answered that Mrs. Cooper was, at that time, both an infant and feme covert; that her coverture continued until her death in 1797; that the descent to her children was suspended during the life of Thomas Cooper, her husband, who was tenant by the curtesy, and who survived until 1817. In reply, it is denied that Mrs. Cooper ever was so seized as to constitute her husband tenant by the curtesy. In order to create such a tenancy, it is said that there must be a seizin *in fact*, either in the wife or the husband in her right. But admitting there was a sufficient seizin, then it is contended that in December, 1793, when the defendant's adverse possession commenced, Cooper was not tenant by the curtesy, as it is not shown that Colden Cooper, his son, was then born; that his life estate did not *commence* until the death of his wife, in 1797; and that the statute having commenced running in 1793, could not be impeded by any subsequent disability.

It is well settled that cumulative disabilities are not allowed or protected by the statute; that a party can only avail himself of the disabilities existing when the right of action first accrued. *Demarest v. Wyncoop*, 3 John. Ch. Rep. 138, and the cases there cited and examined by Chancellor Kent, and *Jackson v. Wheat*, 18 John. 45, where the doctrine is fully recognized.

It is also clear, both from the words and policy of the statute, and the repeated expositions which have been given to it, that if twenty years have elapsed since the right of action accrued, and ten of those years have been free from disability, the right of entry is barred; that is, the party is not entitled to twenty years after the disability ceases, to bring his action, but to ten years only, provided, at the expiration of those ten years, twenty years have elapsed since the right of entry or action accrued.

Thus, in this case Mrs. Cooper, in 1793, when the defendant's adverse

possession commenced, was an infant and feme covert. She was, at all events, entitled to twenty years to bring her action ; and if her coverture continued also for twenty years, she was entitled to ten years after it ceased. The statute would have protected her for thirty years. But if her infancy and coverture had ceased at any time within ten years after the defendant's entry, then she was barred at the expiration of twenty years ; because she had more than ten years free from disability. Her infancy, in fact, terminated in 1796, and her coverture in 1797, when she died. If her husband had not a life estate as tenant by the curtesy, so that her lands then descended to her heirs, their right of entry terminated in 1813, being twenty years from the commencement of the defendant's adverse possession, and more than ten years after the termination of the disabilities, and death of their ancestor. Kent, Ch. J., in *Smith v. Burtis*, 9 John. 181, considers this the true exposition of the statute ; and although he says that the question did not necessarily arise in that case, and therefore he did not wish the opinion on that point then expressed by him, to be considered definitive, subsequent reflection and examination confirmed him in that opinion ; for he reiterates it in the case of *Demarest v. Wyncoop*, already referred to. Vid. also 4 Taunt. 826. 6 East. 50. 4 Day 298. 2 Conn. Rep. 27. 4 Mass. Rep. 182. 4 T. R. 300. Plowd. 353.

Unless, therefore, Thomas Cooper was tenant by the curtesy of his wife's lands, so as to suspend their descent to her heirs, the claim of the lessors of the plaintiff is barred by the statute of limitations.

It seems to be supposed by the counsel for the defendant, that unless the life estate of Cooper had vested, by the birth of a child, *previous to the commencement of the adverse possession in 1793*, although he might subsequently have become tenant by the curtesy, the heirs of Mrs. Cooper could not avail themselves of this new disability, to avoid the bar of the statute of limitations ; that it would fall within the principle of cumulative or successive disabilities, which are not allowed by the policy of the act.

It is clear, that the birth of a child at any time during coverture, whether before or after the commencement of the defendant's possession, would constitute Cooper tenant by the curtesy of all the lands of his wife, of which, during coverture, she was so seized as to support such an estate. Lord Coke, 1 Inst. 30, a, says, "four things belong to an estate of tenancy by the curtesy, viz. marriage, seizin of the wife, issue,

and death of the wife. But it is not necessary that these should concur together all at one time ; and therefore if a man taketh a woman, seized of lands in fee, *and is disseized, and then have issue*, and the wife die, he shall enter and hold by the curtesy. So if he hath issue which dieth before the descent." Vid. also, 8 Rep. 36, Paine's case.* 13 Rep. 23, Menvil's case. 1 Cruise's Dig. Tit. 5, Curtesy, ch. 1, s. 11, 25, pp. 107, 112, 113.

Cooper then had a life estate in the premises in question, which was initiate, as it is expressed, Coke Litt. 30, a, upon the birth of a child in 1793 ; and became consummate upon the death of his wife in 1797, and continued until his death in 1817.

During the existence of this particular estate, the lands of Mrs. Cooper did not descend to her heirs, so as to give them a right of entry. The question then recurs, whether this particular estate, which arose, or was created subsequent to the commencement of the adverse possession in 1793, was a cumulative disability, of which the lessors of the plaintiff cannot avail themselves under the statute, by way of excuse for not having brought their action within thirteen years after the death of their ancestor ; the period within which they must have brought it, if this estate by the curtesy had not existed.

The statute declares that no person shall make any entry into lands, but within twenty years next after his right or title descended or accrued ; *provided*, that if any person entitled to make such entry, be, at the time such right or title first descended or accrued, within the age of twenty-one years, *feme covert*, etc., such person and his heirs shall or may after the said twenty years be expired, make such entry, as he or they might have done before the expiration of the said twenty years, so as such person, within ten years after such disability removed, *or the heir or heirs of such person, within ten years after his death*, make such entry. Now, it is most obvious, that the heirs here contemplated, are such heirs as have a right of entry. The object of the statute was to punish parties guilty of laches in the assertion of their right, by a forfeiture of them. The *proviso* was intended to save those who, in judgment of law, had a reasonable excuse for their delay ; and give to them and their heirs ten years after the disability should be removed, to bring such action, or make such entry as they might have brought, or made within

* Cited sometimes, 8 Rep. 35, b, and of some editions, p. 67.

the twenty years. But the parties in reversion in this case could not have made entry or brought any action to recover the possession during the twenty years. The statute would work great injustice, if it were held to affect the rights of reversioners or remainder-men during the continuance of the particular estate. Such was the view of the statute taken by this court, in *Jackson v. Schoonmaker*, 4 John. 390, and *Jackson v. Sellick*, 8 John. 262. In the first case, it is said, that neither a descent cast, nor the statute of limitations, will affect a right, if a particular estate existed at the time of the disseizin, or when the adverse possession began; because a right of entry in the remainder-man cannot exist during the existence of the particular estate. And the laches of a tenant for life will not affect the party entitled. The reason given shows that the circumstance, that the particular estate existed at the time of the disseizin, or when the adverse possession began, can vary the case. It applies with equal force to a case where it accrued subsequently.

In *Jackson v. Sellick*, the adverse possession commenced in 1772, when Vincent Matthews was tenant by the curtesy; the estate in reversion being in his daughter, then an infant. She married Beekman in 1783; and Matthews, the tenant by the curtesy, died in 1784. Beekman, the husband, died in 1807; and his widow, the daughter of Matthews, was the lessor of the plaintiff. When the adverse possession commenced, the only disability that existed, independent of the estate by the curtesy, was the infancy of the lessor. Her coverture did not commence until 1783; the particular estate having terminated in 1784. It was contended that the lessor being then of full age, and having a right of entry, was bound to exert it; and that she could not avail herself of her coverture; and it was urged that her coverture was a second or cumulative disability, which was never allowed. But the Court held, that during the particular estate, no right of entry had descended to the lessor; that the statute, therefore, did not begin to run until the death of the tenant by the curtesy; that coverture was the first disability; and they reiterate the language used by them in *Jackson v. Schoonmaker*, that the statute of limitations does not affect the right of a remainder-man during the continuance of the particular estate. If the right of remainder-men or reversioners are not affected by the statute, then, during the life of the tenant by the curtesy, it could not have run against the lessors; for they had no right of entry until his death. If

Mrs. Cooper, then was so seized as to constitute her husband tenant by the curtesy, the right of the lessors is not barred by the statute of limitations, and they are entitled to recover.

It is said to be indispensable, that there should be an *actual seizin* of the land, either by the wife or by the husband in her right, in order to constitute him a tenant by the curtesy that a seizin in law is not sufficient to support such an estate it must be *in fact and in deed*.

This is undoubtedly the general language of the English authorities. Coke's Litt. 29, a. Cruise, Dig. 108, Tit. 5, ch. 1, s. 10. But this rule, in its literal strictness, has not been adhered to, either in England or in this country.

In *De Gray v. Richardson*, 3 Atk. 469, Lord Hardwicke ruled, that the husband was entitled to hold as tenant by the curtesy, an estate tail descended to his wife from her brother, which was leased for years; and on which leases there were large arrearages but no rent paid during the life of the wife. So that the possession of a lessee for years, is so far the possession of the person entitled to the inheritance, even before the receipt of rent as to entitle the husband to curtesy. And several other cases in which the relaxation of the rule is exemplified, are collected in 1 Cruise's Dig. 110, 11, 12.

In this Court, *Jackson v. Sellick*, 8 John. 270, it was held not to apply to wild and uncultivated lands; that in relation to them, actual occupation was not necessary to sustain an estate by the curtesy; that the possession follows the title so as to enable the owner to maintain trespass, and, with equal reason, to sustain an estate by the curtesy.

But it is suggested by the counsel for the plaintiff, and I think with great force, that the rule requiring an actual seizin, applies only to cases in which the title of the person claiming is not complete till entry. Thus, a person claiming by descent or devise, has only a seizin in law before entry; and if he die before entry, the inheritance will go, not to his heir, but the heir of the person last actually seized. Upon such a seizin of the wife, there could be no estate by the curtesy. Her issue would not be capable of inheriting from her; and the rule seems to be, that, to enable the husband to be tenant by the curtesy, the wife must have such seizin, as will enable her issue to inherit from her. 1 Cruise's Dig. 112, s. 24.

Now, in all the cases in which an actual seizin of the wife has been held necessary, it will be found that she claimed either as heir or devisee

and not by virtue of a deed or conveyance to which effect is given by the statute of uses.

Where the statute executes the estate, as is said by Blackstone, 2 Com. 238, the party intended to be benefited, is put at once into corporal possession of the land without ever having seen it, by a kind of parliamentary magic. Here the wife did not claim as heir or devisee, but under a deed from Cadwallader Colden; and I apprehend, with the counsel for the plaintiff, that no actual entry was necessary in order to enable her heirs to take, or her husband to be tenant by the curtesy.

I am accordingly of opinion that the plaintiff is entitled to recover in both causes.

SAVAGE, Ch. J.—I propose to consider the rights of the parties, at the several different stages of their title.

In 1787, the title to the premises in question, and other lands, is admitted to have been vested in the people of this State. The act of that year, was a conditional grant of these lands to C. Colden in trust for the heirs of D. Colden. The title, however, did not vest until the conditions were performed, which was in February, 1790. C. Colden was authorized to sell the lands to reimburse advances which it was contemplated he would make, and in fact did make. He took the legal estate, and the heirs, only an equitable one. In May, 1790, he contracted to sell the premises in question to Rogers. This contract he had a right to make, and was in fact the only person, who could convey the title. The defendant, Johnson, went into possession as assignee under the contract, and acquired an equitable interest in the land; but his possession was surely not adverse to the true title. He was considered in law, a tenant at will to the owner of the estate, C. Colden.

Such was the relation of the parties, till the 5th of November, 1792, when C. Colden, who had, in 1790, been reimbursed his advances, put an end to his trust, by conveying the legal estate to the children of D. Colden. Between the trustee and *cestuis que trust*, there was no difficulty. Their title was the same. Before the conveyance of 1792, they severally held different component parts, (if I may so express it,) of the same title. The legal estate was in C. Colden, while the equitable estate rested in the heirs of D. Colden. His (C. C.'s) acts were valid, and binding upon those heirs; and when he conveyed to them the legal estate, they took it, subject to such equitable interests as the

defendant and others had acquired in the lands, by virtue of the acts of the trustee. So far from an adverse possession, which would invalidate the conveyances from C. Colden to the heirs, there existed a tenancy. 4 John. 230. That relation was transferred from the trustee to the heirs. They might have enforced the performance of the contract, and were bound on their part to give the title on the terms and conditions contained in it.

While such were the relations between these parties, the defendant, Johnson, on the 13th December, 1793, received a deed from Cooper as attorney for C. Colden. At this time C. Colden had no interest in the lands; and as the defendants are presumed to have been conusant of the conveyance in 1792, receiving this deed was an act of disloyalty to the true landlords; and may, therefore, be considered with propriety, the commencement of a holding adverse to the title of the lessors.

It is contended that the execution of the deed is evidence of the performance of the contract by the defendant; and so it would be undoubtedly, if it had been given by the owner of the title in pursuance of the contract. But under the circumstances of this case, the deed of C. Colden can have no more legal operation upon the title of the defendant, than if it had been executed by John Stiles. It evinces, however, an intention to hold under a title hostile to that of the lessors, and is therefore adverse. That a possession taken at first under the true title, may subsequently become adverse, seems to be conceded by several decisions of this Court. 1 Cowen 610. 18 John. 488. And this, I apprehend, is an exception to the rule as we find it laid down in *Brandt v. Ogden*, 1 John. 156, that the possession must be adverse in its inception. After the 13th of December, 1793, the defendant claimed the entire title, exclusive of any right in another, and this claim was in hostility to the title of the lessors. Whether Mrs. Cooper had a right of action against the defendant on the execution of the deed to her, in 1792, would depend on the payment of the interest by the defendant. Supposing that to have been done, which we are warranted in assuming, as the case is silent on the point, it follows that Mrs. Cooper had no right of action against the defendant, until December 13, 1793, when he disclaimed her title by taking a deed from another, and as respects the rights of the parties, a stranger.

I assume, then, what to me seems undeniable, that on the 13th of December, 1793, the defendant's possession became adverse, and that

the statute of limitations would then have commenced running, but for the disabilities of Mrs. Cooper. At this time, she was an infant and a feme covert; and it is perfectly well settled, that if several disabilities exist, when the right of action accrues, the statute does not begin to run, till the party has survived them all. 3 John. Ch. Rep. 138. 1 Plowd. 375. It is equally well settled, that cumulative disabilities cannot be allowed. Two disabilities were existing when the right of action accrued; infancy and coverture; and the *proviso* in the statute gives ten years in which an action may be brought, after such disabilities removed. The last of these disabilities was removed by the death of Mrs. Cooper, in July, 1797. Her infancy had ceased in November, 1796.

According to the construction given to the statute, 3 John. Ch. Rep. 137, the party has, in every event, twenty years to make his entry; and if under disability when the right accrues, he has ten years, and no more, after the disability ceases. If twenty years were not to be allowed, and the heirs of Mrs. Cooper were confined to ten years after the death of their mother, their right would have been barred in 1813, though the twenty years would not expire till 1817. But as the statute did not intend to place those persons named in the *proviso* in a worse condition than those who were under no disability whatever, it is a reasonable construction of the statute, that twenty years shall be allowed them at all events. It may happen that this *proviso* will give to some thirty years, while others, under similar disabilities, may have but the twenty years. Such would be the situation of the lessors of the plaintiff, were there no intervening life estate, to suspend further the operation of the statute.

It becomes important, then, to inquire whether Thomas Cooper was tenant by the curtesy; and if so, what effect the existence of his life estate has upon the rights of the parties.

To constitute this estate, four things are necessary: marriage, seizin, issue born alive, and the death of the wife. The marriage in this case took place on the 7th of April, 1792. According to the view which I have taken, the wife became seized of the legal estate, on the 5th of November, 1792. She had one child in 1793, and another in 1795; and died in 1797, when the husband's estate became perfect.

It is objected, however, that the wife could not have that seizin in fact which is necessary to make the husband tenant by the curtesy. It

has been settled by this Court in the case of *Jackson v. Sellick*, 8 John. 269, that a wife who had the legal title to wild and uncultivated lands, had such a seizin as was sufficient to constitute her husband tenant by the curtesy. Here, however, there was an actual entry by the tenant of the wife; for it has also been adjudged by this Court, that a purchaser by contract holds as tenant at will. It is immaterial at what period, during coverture, the wife become seized; whether before issue or after. Nor is it material, whether the issue be living at the time of the seizin. So, if the wife be seized, and disseized before issue, yet if she have issue after the disseizin, the husband shall hold as tenant by the curtesy. Co. Litt. 29, 30. The husband's title does not become perfect till the death of the wife, though, for some purposes, it is supposed to commence at the birth of a child. He is then called tenant by the curtesy *initiate*; but not *consummate*, till the death of the wife.

Assuming, then, that there was such seizin in Mrs. Cooper as entitled her husband to hold as tenant by the curtesy, it becomes necessary to inquire, whether the existence of that estate prevents the operation of the statute of limitations. In *Jackson v. Schoonmaker*, 4 John. 402, it was decided that "neither a descent cast, nor the statute of limitations will affect a right, if a particular estate existed, at the time of the disseizin, or when the adverse possession began; because a right of entry in the remainder-man cannot exist during the existence of the particular estate; and the laches of a tenant for life will not affect the party entitled. An entry, to avoid the statute, must be an entry for the purpose of taking possession; and such an entry cannot be made during the existence of the life estate." In that case, the disseizin happened after the tenancy by the curtesy was consummate; and hence, possibly, the peculiar phraseology of the Court, when they say, "if a particular estate existed at the time of the disseizin, or when the adverse possession began." I apprehend the doctrine is equally true, that the right of a reversioner or remainder-man is not affected by the statute, if the particular estate existed when the right accrued. And the same reason may be given for the one as the other; because the right of entry never existed in him, in reversion or remainder, during the continuance of the particular estate. When did the statute become operative? Not till the death of Mrs. Cooper, as that event terminated the coverture. But the same event which subjected her heirs to the operation of the statute,

consummated the particular estate which precluded them from any right of entry ; *et impotentia excusat legem*.

Before the statute can, by any reasonable construction, be made to operate, there must be some laches on the part of those asserting a right of entry ; and the policy of the statute gives to every claimant at least ten years, within which laches shall not be imputed.

At what period of time, I would ask, was it in the power of the heirs of Mrs. Cooper to have asserted their rights, before 1817, when Thomas Cooper died ? Their infancy, I admit, is no excuse for them, as successive disabilities are not allowed. The statute was not operative till the death of Mrs. Cooper. It is true, indeed, that more than twenty years have elapsed since the adverse possession commenced ; and more than ten years since the last disability was removed, which existed when the disseizin took place ; but I would ask, when were the claimants guilty of laches ? They were not bound to make an entry, or claim, till the death of Mrs. Cooper. And from that period, till the death of the tenant for life, the law would not permit them to enter. Shall laches, then, be imputed to them ? Certainly not. Whether Colden Cooper was born before or after the disseizin, seems to me not to change the rights of the parties. The lessors of the plaintiff have brought their action within ten years after the operation of the statute upon their claim ; and are not barred by it. Having, in my opinion, shown a right to one-fourth of the premises, they are entitled to judgment for so much.

WOODWORTH, J. (*Dissenting in the first cause.*)—I am of opinion that a legal title, to one undivided fourth part of the premises in question, was conveyed to Catharine Cooper, by the deed from Cadwallader Colden, of the 5th November, 1792. At this time, the possession held under a contract to sell, given by William Cooper, as attorney for Cadwallader Colden, was not adverse ; because the purchase rested in contract, and the conditions were not yet performed. An adverse possession cannot commence under a contract to purchase, as has been frequently decided upon reasons fully assigned. The adverse possession of Johnson commenced December 13, 1793, when Cooper conveyed to him. At that time Catharine Cooper was an infant and feme covert. She died in July, 1797, leaving a son born in 1793, since dead without issue ; and Alice, one of the lessors of the plaintiff born September 30, 1795.

The question is, whether the plaintiff is bound by the statute of limitations. It is contended that Mrs. Swartwout had but ten years from the death of her mother to bring a suit; because Thomas Cooper was never tenant by the curtesy; and consequently there was no suspension of the statute. The argument is founded on this, that it does not appear that Colden Cooper was born before the deed executed to the defendants; and if he was not, it is contended that there was not such a seizin in the wife as would make the husband tenant by the curtesy; or, in other words, that it must be an actual seizin after the birth of issue; and that a previous seizin during the coverture and before issue, is insufficient. The law on this subject is otherwise. According to Lord Coke if a man takes a woman seized of lands, and is disseized, and then has issue, and the wife dies, he shall enter and hold by the curtesy. 1 Cruise's Dig. 107, ch. 1, s. 11. Id. 112, s. 25. So that whether the birth of Colden Cooper was before the deed of 1793, or not, is immaterial as to the question whether Thomas Cooper was not tenant by the curtesy, at some period during the coverture. Mrs. Cooper did not take as heir or devisee, in which cases it might be necessary for her to make an actual entry, in order to enable her heir to take by descent, or her husband to be tenant by the curtesy. The title was not cast on her by act of law; but she took under a deed to which effect is given by the statute of uses by which she was put in corporal possession, there being no adverse holding at the time. 2 Bl. Com. 312, 338. 1 Inst. 29.

But admitting this proposition to be correct, the material point is this: when did the right of entry first accrue; and what were the existing disabilities at that time? The answer is, the adverse possession commenced December 13, 1793. The only disabilities then existing were infancy and coverture. No tenancy by the curtesy existed at that period; for it is not shown that Colden Cooper was then born. The birth of a child is necessary to constitute this estate. The husband at that moment had no estate that could be continued beyond the coverture; for, on the death of his wife without issue, the estate would have immediately descended to her heirs. Whether he would ever have a greater *right* was altogether contingent and uncertain. He had not even an inchoate right as tenant by the curtesy; consequently, the *proviso* in the statute applied to coverture and infancy only; and gave ten years after those disabilities were removed. But the party has in any event twenty years to make his entry; and as Mrs. Cooper died in 1797, four years after

her disseizin, the effect of the *proviso* would be to give her heirs sixteen years after her death. The sixteen years ended in 1813. The law is well settled, that the right of entry is not barred until all the disabilities, existing when the right of action accrued, are removed; that there cannot be cumulative disabilities; for when the statute first begins to run, all subsequent disabilities are disregarded. It is then evident that although Thomas Cooper afterwards became a tenant by the curtesy, it does not interpose any additional barrier to prevent the operation of the statute. The following authorities establish the doctrine laid down: 3 John. Ch. Rep. 129. 18 John. Rep. 44. 8 Id. 262. 2 Conn. Rep. 27. 6 East. 80. 4 Mass. Rep. 182. Plowd. 353. As the deed to the defendant, Johnson, bears date December 13, 1793, and by the testimony of Cadwallader D. Colden, it appears that Colden Cooper was born in 1793, it is highly probable that his birth was previous to the disseizin. Had this been shown, then Thomas Cooper would have had a contingent estate as tenant by the curtesy; and in the event of his surviving his wife it would have become absolute. But on the facts before us I am of opinion that the defendant, Johnson, is entitled to judgment.

Judgment for the plaintiff in both causes.

WELLS AND WELLS v. THOMPSON.

Supreme Court of Alabama, January Term, 1848.

[Reported in 13 Alabama 793.]

1. The failure of an Indian reservee, or his or her heirs, under the provisions of the treaty of the 24th March, 1832, with the Creek tribe of Indians, to take possession of the land allotted to them, or in any manner to signify a desire to remain in this State, after the five years expired, determined the estate to which they would otherwise have been entitled, and the land reverted in the United States, without an entry, or other act on the part of its agents.
2. A marriage between a white man and a woman, who is of mixed white and Indian blood, if made between parties able and willing to contract, and consummated, is valid under the law of this State. *Quere*--When a marriage is duly solemnized in this State, does not the strength and perpetuity of the marriage tie depend upon the marriage *domicil*, and not upon any subsequent residence of the parties in a heathen country?

3. A marriage solemnized in this State, is not dissolved by an abandonment of one of the parties, unless sanctioned by a divorce in due form.
4. The husband is a tenant by the curtesy, of waste and uncultivated lands, not held adversely by another, of which the wife had only the legal seizin, if the other incidents necessary to create the tenancy by curtesy exist.
5. The adultery of the husband is not a forfeiture of the tenancy.
6. Though the husband may forfeit his estate, as tenant by the curtesy, by a wrongful alienation, tending to the disherison of the reversioner, or remainder-man, the sale of his interest as tenant, has no such effect.

ERROR to the Circuit Court of Macon. Judgment by his Honor GEORGE W. STONE.

Trespass to try title, by the plaintiffs in error. From a bill of exceptions it appears, that one Mary Wells, under the 2d article of the Creek treaty of the 24th March, 1832, was enrolled as the head of a family, and located on the land in controversy, and that the defendant was in possession at the commencement of this suit. The plaintiffs are the children of Mary Wells, who was not more than one-fourth of Indian blood.

That in 1821, she was married to one William J. Wells, a white man, by an authorized officer in Monroe county, in this State, according to the laws of this State, and whilst residing among the whites, and out of the limits of the Creek tribe. That shortly after the marriage, they removed within the limits of the Creek tribe, and remained domiciled with the tribe until the year 1828, when they with their children, the plaintiffs, went to the Ten Islands, where Wells took up with another woman, and the said Mary repaired with her children, the plaintiffs, to her father's residence in the Creek territory. After this, and before the treaty of 1832, Wells visited the residence of the father of the said Mary, and took and carried the plaintiffs, who were at that time minors, to the State of Arkansas, and neither he nor the children returned to her during her life.

It was proved, that by the laws and customs of the Creek tribe, a man was allowed to take a wife, and abandon her at pleasure, and that this worked an absolute dissolution of the marriage state, and the parties were not allowed to marry again, until after the succeeding annual green corn dance. That the husband took no part of the personal effects of the wife by the marriage, and at her death her personal estate de-

scended to her children, or next of kin. In regard to real estate, it was in proof, that each town had its regular possession under a separate control, worked in common, each occupying a suitable spot within the enclosure, the unappropriated soil being free to all. There was no such thing known among them as title to lands. That if a house was erected by the husband it belonged to him; if by the wife to her.

The defendant then proved, that about the year 1836, he purchased the land in controversy from Wells, for \$1800, and introduced and read a patent from the United States, to the defendant, for the land in controversy, issued on the 1st June, 1843, which recites that Mary Wells, wife of William J. Wells, by virtue of the treaty of 1832, became entitled to a tract of land, which is described; that Wells had sold the same to the defendant, with the approbation of the President of the United States, etc., etc. There was no proof that either Mary J., or William J. Wells, were ever in the actual occupation of the lands.

The defendant moved to exclude the patent from the jury, which the Court refused, and he excepted.

The Court charged, that if William J. and Mary Wells, were married in 1821, according to the law of Alabama, if he was living at the time of the treaty, and continued in life until 1836, his abandonment of his wife in 1828, did not work a dissolution of the marriage contract, though such might be the custom of the Indian tribe. That in that state of case, Mary Wells was not the head of a Creek Indian family, and should not have been located. That the defendant was estopped from denying that Mary Wells was located, but it was competent for him to show that her husband, William J. Wells was the head of the family, and of right entitled to the location. That it was competent for the government to correct its own errors, and the patent, if the facts are believed, might be regarded as such correction by the government, by the act of its agent; and if said Wells, being the surviving husband of Mary, sold to the defendant, and pursuant to that sale the patent issued, they must find for the defendant.

The Court refused to charge, that a change of the residence of Wells and his wife, to the Indian nation, his abandonment of her, and removal to Arkansas—the continued residence of Mary afterwards, she being of Indian extraction, in the Indian nation, was under the proof a dissolution of the marriage.

The Court also refused to charge, that the act of the officer of the

United States, appointed to take the census of the heads of Creek Indian families, determining Mary Wells to be the head of a family, and placing her name on the census roll, was conclusive on the government, and all persons claiming under it. The plaintiff excepted to the action of the Court as stated in the bill of exceptions, and now assign it as error.

S. F. Rice, for plaintiffs in error.

1. A patent issued in violation of law, or obtained by fraud, is void. And the head of a Creek Indian family enrolled and located under the treaty of 1832, may show such enrolment and location to defeat a patent subsequently issued. *Ladiga v. Rowland*, 2 How. U. S. Rep. 581.

2. The Creek treaty of 1832, is itself the title of the head of a Creek family, to the half section of land on which such head of a family is located by the officer of the government; and this title is paramount to that conferred by a patent subsequently issued.

3. The location of the head of a Creek family upon a half section of land, by the officer of the government, under the Creek treaty of 1832, is conclusive upon the government, and all persons claiming under the government by purchase subsequent to the location. *Crommelin v. Minter*, 9 Ala. R. 594; 8 Smedes & Mar. R. 234; *Hit-tuk-ho-mi v. Watts*, 7 Ib. 363; Smede's Dig. 179; § 12.

4. The recitals in a patent are conclusive upon the party claiming under it. And as the patent to the defendant in this case distinctly admits, that the mother of the plaintiffs was entitled to the land by the treaty of 1832, that admission estops the patentee (as well as the government) from denying the plaintiff's title—when it is shown that the plaintiffs are the heirs at law of Mary Wells. (The laws of Alabama were extended over the Creek territory on the 16th day of January, 1832, and long before the death of plaintiff's mother; and therefore her children are by that law entitled to her rights in the land.) *Brasher v. Williams*, 10 Ala. Rep. 630. See the act of 16th January, 1832, entitled "an act to extend the jurisdiction of the State of Alabama," etc., etc.

5. Marriage in Alabama has ever been dissoluble. A marriage between a white man and a Creek Indian woman, in a county (Monroe) subject to the jurisdiction of the laws of Alabama, may be dissolved according to the laws and customs of the Creek tribe, if the parties

acquired an actual *bona fide* domicile in the Creek nation before the dissolution, and before the laws of Alabama were extended over the Creek Indian territory. Story's Confl. of L., § 230, a, 2d ed.; *Dorsey v. Dorsey*, 1 Chand. L. Rep. 287, 289; *Wall v. Williamson*, 8 Ala. Rep. 48; *Wall v. Williams*, 11 Ib. 826.

6. "While the parties remain subject to our jurisdiction, the marriage is dissoluble *only by our law*; when they are remitted to another, it is incidentally remitted along with them." Story's Confl. of L., *supra*; *Wall v. Williamson*, 8 Ala. Rep. 48.

7. The dissolution of the marriage between Mary Wells, and her husband, occurred many years before 1832, when the laws of Alabama were extended for the first time over the Creek territory. The Indian law was the only law of force in that territory, when the dissolution of the marriage occurred. And it would be a most harsh and unjustifiable mode of construing the treaty of 1832, to say that Mary Wells was entitled to nothing under it, although by the Creek Indian law, she was completely divorced from her husband. In the construction of this treaty, and in all acts done under it, the customs and laws of the Creek tribe have been carefully observed and regarded. The very terms used in the treaty, "every head of a Creek Indian family," necessarily imply that regard was to be paid to the Indian laws in determining their family relations. *Wall v. Williams*, 11 Ala. R. 826.

8. The patent being void, is void for all purposes; and could not be good to transfer to defendant the curtesy of the husband, even if he had been tenant by the curtesy. But it is manifest that he was not tenant by the curtesy, for many reasons—one of which is, that he was divorced from his wife long before the Creek treaty of 1832, and before either had any interest in the land. And "the effect of this dissolution of the marriage, according to the Indian laws, is the same in the courts of Alabama, as if directed by a lawful decree." *Wall v. Williamson*, 8 Ala. R. 48; *Wall v. Williams*, 11 Ala. R. 826.

9. The title of the plaintiffs is clearly made out to the land. And every point ruled against them on the trial, was a violation of the law of the country. See the cases above cited.

McLester and Belser, for defendant in error.

1. The marriage between Wells and his wife in 1821, was properly proved. The marriage itself was neither polygamous nor incestuous,

and such a contract, in a civilized country, exists throughout time, unless it be annulled by death or by some legal decree. See *Corn v. Norcross*, 9 Mass. 492; *Fenton v. Reed*, 4 Johns. 53; 16 Mass. 157; *Milford v. Worcester*, 7 Mass. 52; *Car. Law Jour.* 94, 377.

2. The marriage having taken place among the whites, and in accordance with their law, Wells became and continued, the head of the family. The case is different from that of a union between two persons of the Indian tribe, entered into according to the usage of the tribe, and at a time and place, when and where, their laws were in force. See *Sto. Confl. Laws* 122; *Wall v. Williamson*, 8 Ala. 48; *Wall v. Williams*, 11 Ala. 826.

3. The plaintiffs are concluded by the action of the government. The patent has issued—the matter has been settled by a competent tribunal. The record shows no such case as that of Sally Ladiga, settled by the Supreme Court of the United States. It comes within the principle of some of the decisions of this Court. See *Sally Ladiga's Case*, 2 Howard 581; *Parsons's Heirs v. Inge's Heirs*, 5 Porter 327.

4. The bill of exceptions does not show to whom the real estate of an Indian descends, according to the custom of the Creek tribe. In the absence of such proof, our law must govern. If our law governs, then, there is no evidence of the death of Wells, before the commencement of the suit. If Wells is alive, (and this is the presumption, until the contrary is made to appear,) even if his wife was the owner of the land, still his transferee can hold it during the life of Wells; therefore, plaintiff's suit must abate. See *McLain v. Gregg*, 2 A. K. Marsh 454; *Conly v. Porter*, 12 Ohio 79; *Davis v. Mason*, 1 Peters 503; *Jackson v. Lellech*, 8 Johns. 202; *Clute v. Miller*, 2 Cowen 439.

5. There is nothing in the record, going to prove that Mrs. Wells was the head of a family, *independent* of her husband, at the date of the treaty of 1832, or when she was located on the land. If the location was unauthorized, her heirs have no right to complain.

COLLIER, C. J.—By the treaty of the 24th of March, 1832, the Creek tribe of Indians ceded to the United States all their land east of the Mississippi River. The United States engaged by the same instrument to survey this land as soon as the same could be conveniently done, and when surveyed to allow ninety principal chiefs of the tribe to select one section each, and every head of a Creek family to select one half

section each, "which tracts shall be reserved from sale for their use for the term of five years, unless sooner disposed of by them. A census of these persons shall be taken under the direction of the President, and the selections shall be made so as to include the improvements of each person within his selection, if the same can be so made, and if not, then all the persons belonging to the same town, entitled to selections, and who cannot make the same, so as to include their improvements, shall take them in a body in a proper form." It is provided by the third article of the treaty, that "these tracts may be conveyed by the persons selecting the same, to any persons for a fair consideration, in such manner as the President may direct. The contract shall be certified by some person appointed for that purpose by the President, but shall not be valid till the President approves the same. A title shall be given by the United States on the completion of the payment." The fourth article declares, that "at the end of five years, all the Creeks entitled to these selections, and desirous of remaining, shall receive patents therefor in fee-simple from the United States."

Without stopping to inquire what the law may be, upon the point, it may be conceded that the enrolment of the name of Mary Wells as the head of a Creek family, and the allotment to her as such, of the land in controversy, gave her *prima facie* a legal estate, on which she might maintain an action for the recovery of the possession against an intruder. It may also be conceded that if she died before the expiration of five years, without conveying the same as provided by the third article, that her interest did not revert to the United States, but descended to her heirs to be disposed of by them, if adults, or to hold under the provisions of the fourth article. But in the case before us, it does not appear the reservee was in possession, or asserted her right to the land by conveying it, or otherwise; and although she died within the five years, her heirs did not within that time set up their claim to it. In fact, previous to the treaty, they removed with their father to Arkansas, and did not again return to Alabama until after the death of their mother.

The title acquired by the "head of a Creek family" under the treaty, was to continue for five years, unless it was sooner conveyed with the approval of the President; but if there was no such conveyance, it reverted to the United States, unless the reservee or his heirs were desirous of remaining in the country after the expiration of that period.

True, this is not explicitly declared, yet it follows from the terms employed in the fourth article, in which the United States stipulate to issue patents to all the reservees who are "desirous of remaining" "at the end of five years." All the title of the Indian tribe passed from it, and the federal government became the proprietor of the fee in the territory they had previously occupied. The government engaged, among other things, to allot half sections of land to each head of a family, to be enjoyed for five years absolutely, and in fee upon certain conditions. Here was the grant of a fee-simple estate, defeasible on the happening, or rather the not happening of the event specified. If the condition was not performed as provided, the title of the reservee determined, and the land reverted in the United States without an entry, or other act on the part of its agents. See *University of Alabama v. Winston*, 5 Stewt. & P. Rep. 17; *Gill v. Taylor*, 3 Port. Rep. 182; *Kennedy & Moreland v. McCartney's Heirs*, 4 Port. Rep. 141; *Crommelin v. Minter et al.*, 9 Ala. R. 594, 600. If this view be correct, it follows that the failure of the reservee or her heirs to take possession of the land allotted to her, or in any manner signify a desire to remain in this State after the five years expired, determined the estate to which they would have been otherwise entitled.

This interpretation of the treaty is enforced by an act of Congress of the 3d of March, 1837, which authorizes the President to cause all reserves belonging to the Creek Indians by virtue of the treaty, and remaining unsold on the fourth of April thereafter, (precisely five years after the treaty became operative,) to be sold at public auction, etc. The second section of the act authorizes the President to confirm the sales made by the widow, the widow and children, the children, or the lawful administrator of Creek Indians who had died or might die prior to the fourth of April, without having legally disposed of their reserves, and to receive the unpaid purchase-money, etc. By the third section, the President is invested with a discretion in the investment and paying over to the persons entitled, the money received from the purchasers of reserves. 5 U. S. Stat. by Peters, 186. The terms of this enactment go quite beyond what the terms of the treaty justify, and profess to direct the sale of all reserves, and of course those where the reservee is "desirous of remaining." But in respect to reserves, the allottees of which do not come within the latter category, and have not conveyed their interests, the act is potent to show that Congress supposed they

reverted to the United States immediately upon the expiration of the period prescribed by the treaty. The statute could not have been enacted upon any other hypothesis. This is indicated by the provision for confirming irregular sales, and the discretion conferred in respect to the purchase-money to be received under the direction of the President, as well as the power assumed by the first section of the act.

There is perhaps another objection to the plaintiff's title equally fatal to their right to recover in the present action, as that we have considered. Mrs. Wells was of Indian extraction, but not more than one-fourth Indian blood, and married William J. Wells, according to the laws of Alabama, in Monroe county, in 1821, where they both resided. Shortly after their marriage, they removed into the country occupied by the Creek tribe, where they resided until 1828, when they again moved to the "Ten Islands" with their children (the plaintiffs). At this latter place the husband formed an adulterous connection with another woman, and Mrs. Wells left him with her children, and went to her father's house in the Creek territory, whither he had removed after her marriage in 1821. There is no law of this State, which inhibits the marriage of a white man with a woman whose blood partakes of the white and Indian races; and if such a marriage is consummated between persons able and willing to contract, the parties become subject to all the disabilities, and are entitled to all the rights and privileges incident to such a relation. See *Frank and Lucy v. Denham's Adm'r*, 5 Litt. Rep. 530.

Monroe county was the domicile of both the parties at the time they were married, and it cannot be inferred that they then contemplated a residence without the jurisdiction of Alabama. Their subsequent removal to the Creek territory did not *ipso facto* dissolve their connection. Even conceding that they became affiliated with the tribe, did the customs of the nation in respect to marriage, so revolting to Christianity, furnish rules by which the obligations and duties of that state—its permanency and incidents, when solemnized in a civilized country, should be ascertained and determined. We should long hesitate before we would give to this question an affirmative response. It involves other considerations than those which have arisen upon the discussions whether the strength and perpetuity of the *vinculum fidei* depends upon the domicile of the marriage, or the subsequent residence of the parties. See Story's *Conf. of Laws* 188 to 192, and citation in the notes; 2 Clarke & F.

Rep. 488. But however this question may be settled when it shall come up in judgment, is perhaps not now a material inquiry ; for it does not appear that Mrs. Wells separated from her husband until they had fixed their residence at the Ten Islands. The bill of exceptions does not inform where these islands were located, but we must judicially know their position, and that they are in a river, which in 1828 formed a dividing line between the Creek tribe and the settled portion of Alabama ; and from the manner in which the facts are stated, the fair inference is, that Mrs. Wells and her husband settled west of the line. Mrs. Wells then abandoned her husband within the jurisdictional limits of this State, and by such an abandonment unsanctioned by a divorce in due form, their marriage could not be dissolved.

The marriage, then, of W. J. Wells with the plaintiffs' mother, and the birth of issue capable of inheriting, being proved, the husband became tenant by the curtesy *initiate* of the inheritable estate of his wife in lands, and by the death of the wife this tenancy became *consummate*. By the common law as administered in England, it was essential to an estate by the curtesy that the wife should have had an actual seizin or possession of the land, and not a bare right to possess, which is a seizin *in law*. 1 Step. Com. 246 *et seq.* But this rule has been relaxed in this country ; and if the wife be the owner of waste, uncultivated lands, not held adversely, she is deemed seized in fact, so as to entitle her husband to his right of curtesy. The title to such property draws to it the possession ; and that constructive possession continues in judgment of law, until an adverse possession be clearly made out. 4 Kent's Com. 29 *et seq.* It is said that curtesy applies as well to qualified or conditional, as to absolute estates in fee. *Id.* 32 ; 8 Johns. Rep. 262 ; 1 Pet. Rep. 506 ; 5 Cow. Rep. 574.

The bill of exceptions does not inform us whether the land in question was occupied during the lifetime of Mrs. Wells under an adverse claim, and it may be inferred that it was not, as the husband sold it several years after her death to the defendant and others. The reservee, then, had such a constructive possession as would invest her husband with an estate by the curtesy, if the interest which the United States gave her still continues ; and during his life the right of entry and possession cannot vest in the plaintiffs as the heirs of their mother.

Although the statute of Westminster the 2d declares, that the wife's dower shall be lost by her adultery, no such misconduct on the part of

the husband will work a forfeiture of his curtesy. And it has been said that the forfeiture of the wife's estate by her act will not defeat the curtesy. 4 Kent's Com. 34.

The husband, as well as any other tenant for life, may forfeit his curtesy by a wrongful alienation, or by making a feoffment, or levying a fine importing a grant in fee, suffering a common recovery, joining the *mise* in a writ of right, or by any other act tending to the disherison of the reversion or remainder-man. 4 Kent's Com. 34. This is the rule of the English common law, and it seems has been recognized in Maine. 21 Maine Rep. 372. But in *McKee v. Pfout*, 3 Dall. Rep. 486, it was held, that a conveyance in fee by a tenant by the curtesy, though by indenture duly recorded, and with a covenant of special warranty, is not a forfeiture of the estate.

In the case at bar, there is nothing in the record to indicate that W. J. Wells attempted to convey to his vendees a greater interest than his estate by the curtesy. The recital in the patent is, that the land had "been duly sold and conveyed by William J. Wells, to Julian S. Devereux, Moses Thompson, and Weldridge C. Thompson, as appears by the conveyance thereof, dated the 3d day of March, 1836, approved by the President of the United States the 18th day of September, 1841, and deposited in the general land office of the United States." The inference from this is, that the vendor transferred his estate in the land to the vendees according to law; and this conclusion is strengthened by the fact, that the usual form of conveyances by reservees under the treaty, was nothing more, in legal effect, than a relinquishment of their title to the purchaser named in the contract. So that, conceding the strict rule of the common law to be applicable in this State, it is not shown that the husband's curtesy has been forfeited by a conveyance of the fee.

We do not intend to be understood as asserting that the estate of W. J. Wells, as a tenant by the curtesy, or otherwise, continued beyond the 4th of April, 1837. But if the interest of Mrs. Wells, as derived from the treaty, and her subsequent recognition as the head of a "Creek family," survived that period, it will not descend to the plaintiffs during the life of their father, but vests in the latter, or his assignees, to be enjoyed until his death.

It is not material to consider other questions discussed as to the effect of the evidence of title set up by either party. The plaintiffs, we have

seen, have failed to show such a right as will sustain their action; and as they must recover upon the strength of their own claim, and not upon the weakness of that of their adversary, we will not stop to examine the pretensions of the defendant. We have but to add, that the judgment of the Circuit Court is affirmed.

CHILTON, J., not sitting.

Tenant by the curtesy of England, is where a man taketh a wife seized in fee-simple or in fee-tail general or seized as heir in tail special, and hath issue by the same wife, male or female, born alive, albeit the issue after dieth or liveth, yet if the wife dies, the husband shall hold the land during his life by the law of England, Lit., Sec. 35, 29 a.

The generality of the above statement must be somewhat limited by another, viz., that the issue born alive must be such as could by possibility inherit the mother's estate, Lit., Sec. 2, 40 a; and, therefore, though there be issue, yet if the issue could not inherit the mother's estate as heir, as where a woman is seized in tail male, and has issue a daughter only, in that case her husband could take no estate by the curtesy, 2 Bl. Com., p. 128, Co. Lit. 29; and the definition must be further qualified by the remark that the husband will likewise have curtesy in an estate of which the wife becomes seized during the coverture, Co. Lit. 29 b.

Littleton further says, that "he is called tenant by the curtesy of England, because this is used in no other realm, but in England only." This is, however, incorrect, since it is found in Scotland, Ireland, Normandy, and amongst the Germans, Co. Lit. 30 a; Pat. 11, Hen. 3 m. 3; Hale, Hist. Com. Law 180; Muor, c. 1, § 3; Wright, Ten. 193; according to the Coutumier, c. 119, the estate lasted in Normandy only during the widowhood of the husband. Blackstone, Lib. 2, 126, following Littleton, attributes the introduction of the estate to Henry I., or at least gives no other account of its origin. Wright, however, claims for it a much more ancient existence, he says: "Tenancies by the curtesy, or per *legem terrae*, though so called, as if they were peculiar to England, were known not only in Scotland, but in Ireland, and in Normandy also; and the like law or custom is to be found among the ancient Almain laws; and yet it doth not seem to have been feudal, nor doth its original anywhere satisfactorily appear. Some English writers ascribe it to Henry I.; but Nathaniel Bacon calls it a law of counter tenure to that of dower; and yet supposes it as ancient

as from the time of the Saxons, and that it was rather restored by Henry I. than introduced by him. But as there are no notices of this curtesy among the laws of the Saxons, or among those we have of Henry I., I shall propose Mr. Crag's conjecture as the most rational I have met with, who is so far from thinking it feudal that he is of opinion that the original of it is *ex Jure Civili non incommode deduci potest; ex Constantini enim Rescripti* (says he) *sanctum est, ut haereditatis maternae Pater usumfructum filii proprietatem.*"

The estate by curtesy may be said to exist, or to have existed, in all of the United States, whose laws are the outgrowth of the common law, and, while it has been materially modified by statute in many of the States, it has been abolished in but few, as will appear further on in this note; and the four essentials to the estate as laid down by Coke, 30 a, viz., marriage, seizin of the wife, birth of issue, and death of the wife, have been so often recited in the opinions of learned American judges, that it is unnecessary to cite authority to show that they have been recognized as essentials to the estate amongst us.

Curtesy Initiate.

Tenancy by the curtesy is of two kinds, or rather consists in two stages—curtesy initiate and curtesy consummate. The first stage begins upon the birth of issue capable of inheriting the estate from the mother, *Stewart v. Ross*, 50 Miss. 776; *Foster v. Marshall*, 22 N. H. 491; *Marable v. Jordan*, 5 Humph. 417. It has been sometimes referred to the time of the marriage, but this is erroneous, and arises from confusing the estate by curtesy with the right, in a wife's land, given to the husband by virtue of the marriage, as said by Chief-Justice GIBSON in the *Lancaster County Bank v. Staruffer*, 10 Pa. St. 398. "It has sometimes been said that a husband is tenant by the curtesy initiate by the marriage, but there is no curtesy in any degree before the birth of issue; for though the marriage is the foundation of the whole, it does not constitute it at the common law. The husband indeed becomes seized of a freehold by the marriage, but it is his wife's freehold, not his, insomuch that both must do homage for it. In contemplation of law, therefore, her person is his person, and her seizin his seizin. After issue born, he has a separate estate."

In *Monroe v. Van Meter*, 100 Ill. 367, where a marriage had taken place before, and issue had been born after the passage of an act abolishing curtesy, it was held that the husband had, prior to the passage of the act, acquired no such estate as would be protected from destruction on the ground of its being a vested right.

Curtsey Consummate.

The tenancy by the curtesy becomes consummate upon the death of the wife, Co. Lit. 30 a; 2 Blackst. 128. And it is held that until the estate becomes consummate, there is no such estate of freehold in the husband as would merge a term in which he is entitled in his own right. In *Jones v. Davies*, 7 H. & N. 766, in which this point was decided by the Court of Exchequer, POLLOCK, C. B., quoting Coke, said: "According to this high authority then it would seem that until the wife's death, when the estate would be 'consummate,' the husband would only be tenant by the curtesy for certain limited purposes." In the same case in the Exchequer Chamber, WEIGHTMAN, J., said: "It is only upon the death of the wife that the husband becomes tenant by the curtesy in the proper sense of the term . . . During the life of the wife he is only what is called 'tenant by the curtesy initiate,' and as such is respected in law for some purposes, which are enumerated by Lord Coke, but he is not tenant by the curtesy 'consummate,' so as to give him a separate and independent estate of freehold until the death of the wife."

Legal Marriage necessary to sustain Curtesy.

The marriage necessary to sustain the estate by curtesy must be a legal one, Co. Lit. 30 a. Blackstone says a "legal and canonical" one, 2 Blackst. Com. 127, but this seems to be going too far, for a marriage within the Levitical degrees is voidable only, and if not avoided by a divorce obtained in the lifetime of the wife, the husband will take his estate by the curtesy. See Preston, Estates 473, 478. The marriage must be between people capable of contracting a marriage, and curtesy cannot arise where one of the parties is an idiot or insane, for in that case the marriage is void, *ab initio*. See *Turner v. Meyers*, 1 Hag. Consis. 416, and *Morison v. Stewart*, Delegates, 1745, cited by Sir WILLIAM SCOTT in *Turner v. Meyers* at page 417.

Birth of Issue.

Issue capable of inheriting the mother's estate must be born alive, Co. Lit. 29 b. There was at one time a theory that the child must be heard to cry out, but this theory, which was probably based on the occurrence in a writ of Henry III., anno 11, of the clause "*et ipse postmodum ex ea prolem suscitaverit, cujus clamor auditus fuerit inter quatuor parietes*," is no longer in accord with the law, if it ever was, and the cry of the child is simply regarded as one amongst other proofs of life, Co. Lit. 29 b; 2 Blackst. Com. 127.

It was formerly held that the birth must be in the lifetime of the mother, Co. Lit. 29 b, and it was said by Lord Coke, that where a delivery was effected by the Cæsarean operation there could be no curtesy, for the child was not born during the coverture. *Paine's Case*, 8 Co. 35 a; Co. Lit. 29 b; 2 Blackst. Com. 130. It is suggested by Mr. Tudor in his note to Lewis Bowles's case, Tudor's Leading Cases in Real Property, p. 65, that at the present day a child *en ventre sa mere* might now be considered as *in esse* for all purposes; in support of this he cites, *Thellusson v. Woodford*, 4 Ves. 323, and 1 Bright, Husb. & Wife 124; he admits, however, that one of the difficulties suggested by Lord Coke still exists, namely, that the estate during the short interval succeeding the wife's death descends to her next heir and is not divested *ab initio* by the birth of the child; citing 1 Roper, Husb. & Wife 31; *Basset v. Basset*, 3 Atk. 207; *Goodtitle v. Newman*, 3 Wils. 516; 4 Ves. 335.

If the child is born alive it matters not whether it die before its mother, or how long it lives, for its existence, though but for an instant, vests in the husband an estate by the curtesy initiate, which is not divested by the death of the child, *Phillips v. Ditto*, 2 Duv. 549; *Malone v. McLaurin*, 40 Miss. 161; *Taliaferro v. Burwell*, 4 Call. 321; *Bush v. Bradley*, 4 Day 298; *Hay v. Mayer*, 8 Watts 203.

As it is held that the requisites for an estate by the curtesy need not coincide in point of time, Co. Lit. 29 b, it is held that where children are born to a man and a woman in an illicit connection, in a State where bastards are legitimatized by the subsequent marriage of their parents, and the parents subsequently marry and have no other issue, the right to curtesy in all the lands of which the wife may be seized during coverture will vest in the husband, *Hunter v. Whitworth*, 9 Ala. 965.

In some States of the Union birth of issue is no longer necessary to give the husband an estate by curtesy, but the husband surviving the wife will take the estate, where no children have been born. See Oregon Gen. Laws, ch. XVII., Tit. II., § 30, p. 588; Alabama, Code 1876, Tit. 5, ch. 1, § 2714; Michigan, 2 Comp. Laws (1857), ch. 89, § 30, p. 856; Minnesota, 1 Stat. at Large (Bissell 1873), ch. 32, § 164, p. 630; Nebraska, Comp. Stat (1881), ch. 23, § 29, p. 215; Ohio Rev. St. (1880), § 4176, p. 1046, and the same is held to be the law in Pennsylvania since the passage of the married woman's act, *Gamble's Estate*, 5 Clark 4; S. C. 1 Parsons 489.

We have seen a rather striking instance of the rule that the essentials of curtesy need not coincide in time; so, by the same rule, the birth of issue and seizin need not be at the same time, and, therefore, where there is a seizin during coverture and the land is conveyed and issue is afterwards born, or where the land is acquired after the death of the issue, in either

case the husband will be entitled by the curtesy, *Guion v. Anderson*, 8 Humph. 298; *Phillips v. Ditto*, 2 Duv. 549; *Jackson v. Johnson*, 5 Cow. 74; *Heath v. White*, 5 Conn. 235. In the last case the Court denied that the estate by the curtesy rested, entirely, on the obligation of the husband to support and maintain the children of the marriage, and instanced as evidence in support of its position the fact that a man marrying a widow with children by a former husband, and afterwards having issue by her, would take the whole estate as tenant by curtesy.

Estates in which Curtesy is given.

The estate by curtesy at common law embraces all estates of inheritance held by the wife, and this is the general law in the United States. In Vermont, however, there is no curtesy in an estate tail, it being held that the Act of October 31, 1823, by expressly mentioning curtesy in estates in fee-simple, excluded the ordinary common law rule, *Giddings v. Cox*, 31 Vt. 607, and it is also, there, held, that the statute which converts an estate tail into a fee-simple in the hands of the issue in tail will not alter the case so as to give the husband of the wife tenant in tail, an estate by the curtesy, the sole question for consideration being of what estate was the wife seized during the coverture, and that being an estate tail and no enlargement of it taking place during her seizin, the husband is not entitled, *Haynes v. Bourn*, 42 Vt. 686.

Curtesy in Conditional and Qualified Estates.

The estate by curtesy is attached not only to absolute but to qualified or determinable estates and to those subject to conditional limitations, *Wells v. Thompson*, 13 Ala. 793; *Thornton's Executors v. Krepps*, 37 Pa. St. 391; even after the condition divesting the estate has happened, thus where there was a devise to three sisters, A., B., and J., and the will contained a provision that in case of the death of any one without leaving issue, her share should go to the others, and J. married and had a child who died before her mother, it was held after J.'s death that her husband was entitled to his curtesy, *Crumley v. Deake*, 8 Baxt. 361. [See as to the distinction, with reference to curtesy, between a condition and a limitation, *infra* pp. 282-3.

Curtesy given in Equitable Inheritances, but not in mere Equitable Rights.

The right to tenancy by curtesy extends to equitable estates of inheritance of the wife, *Robinson v. Codman*, 1 Sumn. 121; *Shoemaker v. Walker*,

2 S. & R. 554; *Baker v. Heiskell*, 1 Cold. 641; *Dubs v. Dubs*, 31 Pa. St. 149; *Rawlings v. Adams*, 7 Md. 26; [in Maryland, curtesy in an equitable estate is expressly given by statute, provided it shall not take effect to the prejudice of any claim for purchase money or other lien on the wife's estate. Rev. Code (1878), Art. XLV., § 2, p. 397; it is given by statute in West Virginia also, Rev. St. (1879), ch. 82, § 17;] *Taylor v. Smith*, 54 Miss. 50; *Tremmel v. Kleiboldt*, 6 Mo. App. 549; *Baker v. Nall*, 59 Mo. 268; *Alexander v. Warrance*, 17 Id. 228; *Gilmore v. Gilmore*, 7 Oreg. 374; but the husband is not entitled to curtesy in a mere equitable right. In *Sentill v. Robeson*, 2 Jones, N. C. Eq. 510, the law, as to this point, was thus stated by PEARSON, J., "A husband is entitled to curtesy in a trust or other equitable estate of his wife. This means an express trust—one by the consent of the parties so as to give an *estate* in equity as distinguished from a *right* in equity." And the Court held that there could be no curtesy in a right to convert an apparent owner of land into a trustee for the wife.

There can be no curtesy in a preëmption right, *McDaniel v. Grace*, 15 Ark. 465.

Seizin of Wife necessary.

Seizin is one of the necessary factors of an estate by the curtesy, and at common law the seizin must have been in deed, and seizin in law was not sufficient to uphold the estate, Co. Lit. 29 a, and this has been held to be the law here by some courts in this country. Thus in *Stoddard v. Gibbs*, 1 Sumn. 263, STORY, J., held that the common law rule of seizin prevailed in Massachusetts and Rhode Island, and in *Neely v. Butler*, 10 B. Mon. 48, the Supreme Court of Kentucky upheld the rule, SIMPSON, J., who delivered the opinion of the Court, thus stating the reason of the decision: "It is the duty of the husband to enable him to protect the land from injury and for the purpose of fortifying the title of his wife to take it into actual possession. The wife being disabled by coverture to do it herself, the law devolves the duty on the husband, and if he fails in its performance, he has no interest in the land upon the death of the wife. The uniform course of the decisions in this Court, therefore, has been to regard actual seizin by the husband during coverture as necessary to entitle him to an estate in the land of his wife after her death, as tenant by the curtesy." See also *Mercer's Lessee v. Selden*, 1 How. 37; *Lessee of Barr v. Galloway*, 1 McL. 476; *Adams v. Logan*, 6 T. B. Mon. 175; *Stinebaugh v. Wisdom*, 13 B. Mon. 467; *Welch's Heirs v. Chandler*, Id. 420.

The general tendency, however, has been to disregard the requirement of actual seizin, as being no longer supported by the reason which formerly

existed. In some cases the Court has hesitated to go so far as to declare a legal seizin sufficient under all circumstances, but has simply relaxed the rule with reference to certain kinds of land; as said in *Wells v. Thompson*, 13 Ala. 793, *supra*: "By the common law as administered in England it was essential to an estate by the curtesy, that the wife should have had an actual seizin or possession of the land and not the bare right to possess, which is a seizin in law, 1 Steph. Com. 246 *et seq.* But this rule has been relaxed in this country; and if the wife be the owner of waste, uncultivated lands, not held adversely, she is to be deemed seized in fact, so as to entitle her husband to his right of curtesy. The title to such property draws to it the possession; and that constructive possession continues in judgment of law until an adverse possession be clearly made out, 4 Kent Com. 29." The rule here stated as to wild lands is also recognized in *Green v. Lister*, 8 Cr. 243, in which case STORY, J., states the reason of the relaxation of the old rule: "The object of the law in requiring actual seizin, was to evince notoriety of title to the neighborhood and the consequent burthens of feudal duties . . . But in a mere uncultivated country, in wild and impenetrable woods, in the sullen and solitary haunts of beasts of prey, what notoriety could an entry or gathering of a twig or acorn convey to civilized man at the distance of hundreds of miles?" To the same effect as the foregoing cases see *Malone v. McLaurin*, 40 Miss. 161; *McDaniel v. Grace*, 15 Ark. 468; *Guion v. Anderson*, 8 Humph. 298; *Davis v. Mason*, 1 Pet. 503; *Ferguson v. Tweedy*, 56 Barb. 168; *Shores v. Carley*, 8 Allen 425; *Gillespie v. Worford*, 2 Cold. 632.

In *Jackson v. Johnson*, 5 Cow. 74, the operation of the general rule of actual seizin was considered by the Court to be of limited scope. SUTHERLAND, J., said that in all cases where actual seizin of the wife had been required, it would be found that the wife claimed either as heir or devisee, and the Court held that where the wife's title rested on a deed taking effect by the Statute of Uses, the corporal possession would be drawn to the legal title "by a kind of parliamentary magic."

An exception to the rule requiring actual seizin is also recognized where entry or seizin during the coverture has been prevented by bodily fear, *Lessee of Barr v. Galloway*, 1 McL. 476.

In other cases the courts have gone farther, and held that where the wife was either actually possessed, or had the right of immediate possession of the land, so that entry could have been made by the voluntary act of the husband, and there was no adverse possession of the said land, there was a sufficient seizin to support the estate by curtesy. *Day v. Cochran*, 24 Miss. 261; *Rabb v. Griffin*, 26 Id. 579; *Redus v. Hayden*, 43 Id. 614; *Bush v. Bradley*, 4 Day 298; *Wass v. Buckman*, 38 Me. 356; *Kline v. Beebe*,

6 Conn. 494; *Chew v. Commissioners of Southwark*, 5 Rawle 160; *Reaume v. Chambers*, 22 Mo. 36; *McKee v. Cottle*, 6 Mo. App. 416; *Borland's Lessee v. Marshall*, 2 Ohio St. 308; *Watkins v. Thornton*, 11 Id. 367; *Buchanan v. Duncan*, 40 Pa. St. 88.

It is also held expressly that even where a descent is cast upon the wife during coverture, entry is not necessary to support curtesy. *Harvey v. Wickham*, 23 Mo. 112; *Stephens v. Hume*, 25 Id. 349; *Reaume v. Chambers, supra*; *Childers v. Bumgarner*, 8 Jones, N. C. Law 297.

A recovery in ejectment has been held a sufficient seizin to support curtesy, *Ellsworth v. Cook*, 8 Paige 643; so also a decree in equity settling rights. *Id.*

Where a married woman owning a vested remainder in tail received a surrender of the particular estate, it was held that she had acquired a sufficient seizin to support an estate by the curtesy. *Pierce v. Hakes*, 23 Pa. St. 231.

Where the wife is a minor, and her guardian retains possession of her land after the marriage, his seizin is that of the woman so far as to support the estate by curtesy. *Powell v. Gossom*, 18 B. Mon. 179; *Phillips v. Ditto*, 2 Duv. 549.

Where a husband and wife executed a deed of the wife's unimproved land, purporting to pass the fee, and the deed was ineffective for want of a proper certificate of acknowledgment, the entry of the grantees under the deed was held to be a sufficient seizin to support the curtesy, and uphold, until the husband's death, the possession of the grantee. *Vanarsdall v. Fauntleroy's Heirs*, 7 B. Mon. 401.

Possession by a tenant for years, or at sufferance, is a sufficient seizin by the wife for the purposes of curtesy. *Malone v. McLaurin*, 40 Miss. 161.

The seizin of one tenant in common is so far the seizin of another as to enable her husband to claim by the curtesy. *Wass v. Buckman*, 38 Me. 356; *Dunscomb v. Executors of Dunscomb*, 1 Johns. Ch. 508; *Buckley v. Buckley*, 11 Barb. 43; *Childers v. Bumgarner*, 8 Jones, (N. C.) Law 297. The law in this respect being in accord with that of England, as it formerly was, see *Sterling v. Penlington*, 7 Vin. Abr. 150, pl. 11, and differing from that in force in that country since the statute 3 & 4 Wm. IV., c. 27, § 12. See *Culley v. Doe d. Taylerson*, 11 Ad. & Ell. 1008; *Doe d. Holt v. Horrocks*, 1 C. & K. 566.

The receipt of rents and profits of land is held sufficient seizin, even where the rule of actual seizin is insisted upon, *Powell v. Gossom, supra*; but where a devise was made to a married woman of the sole control of all the income from an estate, without accountability, it was held that estate was not so "owned and possessed" as required by the Revised Statutes of Kentucky,

Vol. 2, ch. 47, Art. 4, § 1, p. 22, as to give the husband an estate by curtesy, *Stewart v. Barclay*, 2 Bush. 550.

Where curtesy is sought in an equitable estate, an equitable seizin is sufficient, and the receipt by the *cestui que trust* of the rents, issues, and profits, or an actual possession of the land by her trustee, will uphold the estate by curtesy, *Cushing v. Blake*, 30 N. J. Eq. 689.

No Curtesy in a Remainder after a Freehold.

The estate of the wife, whether an actual or a potential seizin only be required to support curtesy, must be a present one, and there can be no curtesy in a remainder, or reversion after a freehold estate, where the particular estate is not determined during the coverture, *Planter's Bank of Tennessee v. Davis*, 31 Ala. 626; *Stoddard v. Gibbs*, 1 Sumn. 270; *Tayloe v. Gould*, 10 Barb. 400; *Mackey v. Proctor*, 12 B. Mon. 433; *Eldredge v. Forrestal*, 7 Mass. 253; *Blood v. Blood*, 23 Pick. 80; *Shoemaker v. Walker*, 2 S. & R. 554; *Weir v. Humphries*, 4 Ired. Eq. 279; *Fisk v. Eastman*, 5 N. H. 240; *Dunham v. Osborn*, 1 Paige 634; *Watkins v. Thornton*, 11 Ohio St. 367; *Prater v. Hoover*, 1 Cold. 544; *Orford v. Benton*, 36 N. H. 395; *Young v. McIntyre*, 6 W. N. C. 252; *Reed v. Reed*, 3 Head. 491. In *Shores v. Carley*, 8 Allen 425, BIGELOW, C. J., said: "The rule of law is well settled that a man cannot be tenant of the curtesy of a remainder, or a reversion. The reason of the rule is that in such case one of the essential elements of a title by curtesy is wanting. The seizin of the wife must be a seizin in deed, that is an actual seizin, or possession of the estate, to give the husband a right by curtesy. There can be no such seizin of a reversion, or remainder expectant on the termination of a freehold estate in another. Of such an estate the wife can have only a seizin in law, or constructive seizin."

This same reason will apply in those States where a potential seizin is sufficient to support curtesy, for the potential seizin being by construction made equal to actual seizin, and in no other way supporting the curtesy, it follows that it is subject to the same conditions, and that as there can be no present actual possession of a thing for whose enjoyment the time has not yet come, so neither can there be a constructive present possession thereof. An outstanding dower is such an estate as if not determined during the coverture will defeat the estate by curtesy, *Reed v. Reed, supra*; *In the matter of Oregre*, 1 Barb., Ch. 601; *Hitner v. Ege*, 23 Pa. St. 305; *Williams v. Baker*, 71 Id. 476. Where an estate-tail is converted by statute to an estate for life in the first taker, with remainder in fee to the heirs, the husband of the first taker cannot have curtesy, *Burris v. Page*, 12 Mo. 358.

In *Mackey v. Proctor*, 12 B. Mon. 433, J. H. Y. conveyed to her son W. certain land by a deed which contained the following reservation, "the said J. H. Y. is to reside on the land during her life or so long as she may think fit." W. died before his mother, leaving a child M., who married and died before her grandmother, J. H. Y. It was held that the reservation in the deed was of a life estate, that consequently W., and after him M., had only a remainder, and hence that M.'s husband was not entitled to curtesy in the land conveyed by the deed.

Seizin to Sustain Curtesy must be Beneficial.

The wife's estate to sustain curtesy must be both beneficial and present, in the sense that no freehold prior to her estate of inheritance exists, therefore where a woman was seized in fee, in trust for the grantor for life, with a reversion in the beneficial interest to herself, it was held, that the husband was not entitled to curtesy, *Chew v. Commissioners of Southwark*, 5 Rawle, 159. KENNEDY, J., in the course of a learned examination of the question said, "Now the quotation from Lord Coke relative to the seizin that is necessary to give a right to dower, and the nature of the estate out of which such right may or may not be claimed, is equally applicable as well as necessary to establish a right by the curtesy. And Lord HARDWICKE, accordingly, in the case of *Hearle v. Greenbank*, 1 Ves. Sr. 307, laid it down in these words: 'Though said to be determined in *Casborn v. Scarfe*, 1 Atk. 603, that husband may be tenant by the curtesy of a trust in equity; yet the wife must in the first place have the inheritance; and secondly, there must be a seizin of the freehold during the coverture.' The same principle is repeated and confirmed by Chancellor KENT in his *Commentaries*, Vol. 4, p. 31 (of the first edition), who there states, 'the wife must have had a seizin of the freehold and inheritance *semel et simul*, either at law or in equity during the coverture.' But the seizin at law here mentioned, must be understood as a seizin attended by or under a right of ownership; because in addition to what has been already advanced going to show that this must be so, the husband, if entitled to the estate at all by the curtesy, has the right to it immediately upon the death of his wife, or it would not be, as has been already shown, a continuation of the estate or right of the wife; but if the wife was seized only in trust for the use of another, and not for her own benefit, at the time of her death, the husband cannot take, for Chief Baron GILBERT, in his treatise on Uses and Trusts, 171, lays it down that 'tenant by the curtesy, or tenant in dower, cannot be seized to uses, because they come to these estates by the disposition of law, for the advancement and encouragement of matrimony; and those

estates are given them for their own maintenance, and are consequently exclusive of all other uses for the advantage of other people.' And besides to permit the husband to take the estate for his own use on the death of his wife, where she was only seized of the freehold as a trustee, would be in direct violation of the trust and of the rights of the *cestui que trust*, which are paramount to that of either the wife or the husband, and, therefore, is not to be tolerated for a moment." See also *McKee v. Jones*, 6 Pa. St. 429.

Outstanding Term of Years will not prevent Vesting of Curtesy.

The outstanding estate, to prevent the right to curtesy from attaching, must be a freehold, and an outstanding term of years will not have that effect, *Weir v. Humphries*, 4 Ired. Eq. 279; even if the term be of great length. See *Lessee of Lowry v. Steele et al.*, 4 Ohio 170, where the term was over seventy years, for the termor is not vested with the land, but with the term only, and therefore, where the land is upon lease for years, there may be curtesy without entry or even without the receipt of rents, the possession of the lessee being that of the husband and wife. Harg. Co. Lit., note 29 a; 2 Blacks. Com. 144; 1 Cr. Dig. 64, 161.

In *Carter v. Williams*, 8 Ired. Eq. 177, the testator devised to his wife a plantation *durante viduitate*, or until his son, R., arrived at the age of twenty-one years; he then made a devise of the plantation to his children, one-third thereof on the death of the widow and the other two-thirds upon her marriage. M., a daughter of the testator, married, had issue and died, leaving a husband, before R. reached twenty-one. On R.'s attaining that age, M.'s husband claimed curtesy. It was held, that he was not entitled to it in the one-third, the widow's estate therein being a freehold, but her estate in the remaining two-thirds was for years only, *i. e.*, until R. reached twenty-one, and hence that the husband of M. was entitled to curtesy therein.

In *Robertson v. Stevens*, 1 Ired. Eq. 247, an estate was given to A., with the proviso that the possession should be in B. until a certain claim should be paid. A. afterwards married. It was held that the interest of B. was no more than that of a termor or a chattel interest and would not interfere with the curtesy of A.'s husband.

Right to Curtesy in a Legal Estate cannot be Barred by the Will of the Grantor or Devisor.

The right of the husband to curtesy is so inherent in the wife's estate of inheritance that it cannot, at least in a legal estate, be barred by the will

of the grantor or deviser of the estate, *Thornton's Executors v. Krepps*, 37 Pa. St. 391; *Mullany v. Mullany*, 3 Green, Ch. 16; as said by LOWRIE, C. J., in the first-named case: "The incidents of an estate do not depend upon the intention of it; but are engrafted on it by law, and generally, at least, without any regard to the intention of the grantor and even in disregard of it. Our inquiry, therefore, is not after the intention of the testator, relative to the claim of curtesy; but for the character of the estate intended to be granted by him and whether curtesy is an incident by law to such an estate."

In the *Lessee of Buchanan v. Sheffer*, 2 Yeates 374, there was a devise to a daughter and her heirs and assigns forever, but if she should die without issue the will directed the executor to sell the lands and divide the proceeds; it was held that the daughter's husband was entitled to curtesy, for "the wife was seized of an inheritance during her life, which her issue by possibility might inherit and which they would have inherited if they had not been disappointed by death."

And where a sole and separate estate, not in trust, was given to a wife by a deed which expressly barred the husband's curtesy, he was nevertheless held entitled thereto, and that although the estate was purchased with the wife's money, the Court saying: "It was originally money that was bequeathed to her, and when she converted it into land, she could impose no terms upon her title to the land different from those attached to the money. That was merely for her separate use and all other limitation of her title, contained in the deed, are without authority," *Johnson v. Fritz*, 44 Pa. St. 449.

In Illinois, the law differs from that generally in effect, and it is there held that where a deed or devise is made to a wife for her separate use with a power of disposal, and the wife exercises such power, the husband cannot have curtesy, *Pool v. Blaikie*, 53 Ill. 495; *Monroe v. Van Meter*, 100 Id. 347.

A husband may be tenant by the curtesy of his wife's separate estate, notwithstanding the fact that he is cut off from any participation in the rents and profits during the coverture, *Carter v. Dale et al.*, 3 Lea 710.

A deed to a married woman, habendum "to her, her heirs and assigns, to her and their sole use, benefit, and behoof," will not exclude the husband's curtesy, *De Hart v. Dean*, 2 Mc.A. 60.

Curtesy in an Equitable Estate may be Barred by the Instrument Creating it.

In giving an equitable estate the deed or devise may be so drawn as to exclude the husband from curtesy, *Baker v. Heiskell*, 1 Cold. 641; *Cochran*

v. *O'Hern*, 4 W. & S. 95; *Rigler v. Cloud*, 14 Pa. St. 361. In *Stokes v. McKibbin*, 13 Pa. St. 267, the question of exclusion was examined by Chief-Justice GIBSON, who said: "Whether Daly was tenant by the curtesy depends on the precedents. The first of them is *Bennet v. Davis*, 2 P. Wms. 316, in which it was held that a husband is excluded from curtesy of his wife's equitable estate wherever there is a manifest intention to exclude him. The lands were devised to the wife for her separate use, with direction that the husband should not be tenant by the curtesy; and though he would have been so at law, yet as trustees had not been interposed, he was declared to be a trustee for her heirs and decreed to convey to them. There was no express declaration in *Roberts v. Dixwell*, 1 Atk. 606, that the husband should not be tenant by the curtesy; but the testator directed that the trustees should convey to the use of his daughter for life in such wise that she alone or her appointees should receive the rents and profits, that her husband should not intermeddle, but that, after her decease, the trusts should be for the heirs of her body, and Lord HARDWICKE decided that as the trust was executory, the daughter took an estate for life only, and that he was consequently not tenant by the curtesy. He went further in *Hearle v. Greenbank*, 3 Atk. 716, though it was conceded that the daughter had an estate of inheritance, he said the testator had made her a feme sole by giving her the profits to her separate use, and that her husband, therefore, could have no seizin during the coverture, 'he could come at neither the possession nor the profits.' In remarking on the discrepancy between that case and the next preceding one the Vice Chancellor, SIR JOHN LEACH, said in *Morgan v. Morgan*, 2 Madd. 408, that the husband may be tenant by the curtesy of his wife's equitable inheritance, notwithstanding a naked direction to pay the rents and profits to her separate use. Yet he admitted the question was not of power, but of intention 'at law;' said he, 'the husband cannot be excluded from the enjoyment of property given to or settled upon his wife; but in equity he may; and this not only partially by a direction to pay the rents or the profits to the separate use of the wife during coverture, but wholly, by a direction that upon the death of the wife the inheritance should descend to the heir of the wife and that the husband shall not be entitled to be tenant by the curtesy. Such a provision was made in *Bennet v. Davis*, and was acted upon by the Court.' One would think that a declaration, that the husband should not touch the income, and that the property should go instantly to another at the wife's death, would be equally operative. It seems absurd to suppose that the settler would give him the equitable seizin stripped of the fruits of it. In every case perhaps the object of the exclusion is to protect not only the wife, but her children from his prodigality; and it would, therefore, be but

imperfectly attained were he allowed to resume his marital rights at her death. In the deed of trust before us, it is said not only that he shall not have the profits, but that the property shall not be in the power or subject to the debt, contract, or engagement of her present or any future husband. But if he were to be tenant by the curtesy at her death, he might, notwithstanding, squander the anticipated profits in her lifetime. That the exclusion of him was intended to be entire is obvious from the direction that the property should go, immediately after his wife's death, to her heirs or appointee, which meant something more than that it should go encumbered with curtesy."

What Provisions in a Trust will Exclude Curtesy.

It being recognized law that a trust may be so drawn as to exclude the husband's curtesy, and that the question before the Court in each case is that of intent and not of power, it is of some importance to see what provisions in a trust will be held to show an intent to bar curtesy.

And first, a mere declaration that the trust is for the sole and separate use of the wife will not bar the curtesy, *Mullany v. Mullany*, 3 Gr. (N. J.), Ch. 16; *Cushing v. Blake*, 30 N. J. Eq. 686; *Tremmel v. Kleiboldt*, 6 Mo. App. 549; *Stewart v. Stewart*, 7 John. Ch. 229; and it is held that the fact, appearing on the face of the instrument creating the trust, that the trust has been made by a husband, or intending husband, for the benefit of his wife, or intended wife, will not have that effect; thus, in *Cushing v. Blake*, 29 N. J. Eq. 399, a man, contemplating marriage, conveyed to a trustee on a declaration that the land was held in trust for the separate use of the intended wife, and that he would convey the same as requested by her during her life, or according to the terms of her will, or, on failure of any appointment, to the wife, to her heirs at law in fee-simple. The Court held that the equitable estate in fee-simple vested in the wife, and there being no words of exclusion, the husband would take an estate by the curtesy. The chancellor further held that the fact that the trust proceeded from the husband himself was not a circumstance which would lead the Court to a decision which would exclude the husband, and on *Rigler v. Cloud*, 14 Pa. St. 361, being cited as sustaining the position, which would exclude the husband, the chancellor strongly disapproved of that case, and said: "Indeed, it would seem that where a gift is made under such circumstances by the husband to the wife for her benefit, the curtesy should be favored rather than the contrary. There is nothing unreasonable in a provision of law that, under such circumstances, the husband should, at the death of his wife, if she shall not have disposed of the property,

have the same right that he would have had, had the gift proceeded from some one else, or had the property been purchased with her own money." The chancellor's decision was affirmed in 30 N. J. Eq. 689. To the same effect is *Frazer v. Hightower*, 12 Heisk. 94.

In spite of this authority, it may well be thought that as the moving cause of a settlement for the benefit of a wife is, as said by GIBSON, C. J., *supra*, generally to protect the wife and issue from the extravagance or necessities of the husband, the presumption would be especially strong that such was the motive where the husband himself puts his estate in trust for his wife in fee, and that therefore this would be an additional argument that the intent was to exclude the estate by the curtesy. And this is the law in Pennsylvania. Thus in *Rigler v. Cloud*, *supra*, the husband made a conveyance "to the use of Maria Rigler [the wife of the grantor], and her heirs forever, so that the same shall not be subject in anywise to the future control, debts, or liabilities of her present or any future husband," and it was held that the estate by curtesy was barred; but in *Dubs v. Dubs*, 31 Pa. St. 149, a testator made a devise in trust "for my daughter Adelaide, and her heirs . . . to hold the said lands . . . as to the yearly income or produce in trust for the sole and separate use of my said daughter Adelaide, without and *free from the control* of any husband to whom she may be married, and without any power of her or her husband aliening or disposing the estate," etc. At the time of making the will, and of the testator's death, Adelaide was unmarried, and did not contemplate any particular marriage. It was held that the estate by curtesy was not barred. As it may be suggested that the claim of curtesy might have been sustained by striking down the trust as not made in contemplation of any particular marriage, thus leaving Adelaide vested with a legal estate in fee-simple, in which, of course, curtesy would be had, it is worth while to note that the Court expressly said that it did not discuss the question of the validity, or effect of the trust, and besides, said, "It is in form an equitable fee, and in substance it is a fee legal or equitable; and there is nothing to prevent its descent as a fee."

In construing marriage settlements, or deeds of the nature thereof, the Courts have given instances of considerable liberality in sustaining a presumed intention to bar an estate by the curtesy. In *Ward v. Thompson*, 6 G. & J. 349, there was an ante-nuptial settlement of the wife's property on trustees to the use of the wife, without impeachment of waste, subject to the exclusive and entire control of the wife, her heirs, etc., without interference on the part of the husband, and with power to the wife to dispose of her property as if a feme sole. This settlement was held to bar the estate by curtesy. See also *Townsend v. Matthews*, 10 Md. 251. The same effect has

been given to what was practically a marriage settlement, without the intervention of trustees, thus, where an intended husband executed a deed as follows: "I . . . do hereby sell, assign, deliver, alien, and confirm to the said M. [the intended wife] all the right, title, estate, interest, and benefit which I may, by operation of law, acquire, derive, or receive, either at law or equity, in and to the following real and personal estate belonging to the said M., by reason of our marriage," it was held that he would take no curtesy in the land mentioned in the deed, *Hooks v. Lee*, 7 Ired. Eq. 83; and where an agreement has been arrived at between an intended husband and wife, that the wife should dispose of her property as she pleased by will or otherwise, and the parties to the agreement have acted thereupon, the Courts have gone some distance in upholding the agreement, though not evidenced by a formal settlement, thus in *Lant's Appeal*, 9 W. N. C. 209, S. C. 10 Reporter, 645, a parol ante-nuptial agreement was made whereby the wife was to have power to dispose of her property as she saw fit, she thereupon made a will, and afterwards married. The Court held that though the will was revoked by the marriage, according to the provisions of the Act of the Assembly of Pennsylvania of 8 April, 1833, § 16, P. L. 251, yet it would be enforced in equity as an ante-nuptial settlement.

In *Mason v. Deese*, 30 Ga. 308, marriage articles contained a declaration as follows, "said property, nor any part thereof, or the proceeds or hire thereof, is never to be subject to the control, contracts, or liabilities" of the husband. The early part of the articles set out that their object was the securing of the property to the sole and separate use of the wife and family, and contained a covenant by the husband, that he would exercise no power or authority other than as authorized by the settlement. The judge who delivered the decision of the Court was of opinion that there was a manifest intention to bar the curtesy, but, there being a difference of opinion amongst the judges, the case was allowed to go to a jury, to consider the intention of the parties under the circumstances of the settlement. This method of avoiding a decision by a divided Court seems to violate the distinction generally maintained as to the provinces of the Court and the jury.

Every presumption is in favor of curtesy as a natural legal incident of an estate, either legal or equitable, and, therefore, even in a settlement by the husband, the intent to exclude curtesy must clearly appear, *Jones et ux v. Brown*, 1 Md., Ch. 191.

In other cases to exclude the husband from his curtesy in a trust estate of the wife, the words of exclusion must be plain; it is not enough that the estate is for the mere sole and separate use of the wife, the intent to exclude the husband from his marital rights in the property must be plainly expressed, *Tremmel v. Kleiboldt*, 6 Mo. App. 549.

In *Payne v. Payne*, 11 B. Mon. 138, a father gave land in trust for his daughter S., to be at her disposition, the trust to cease on the death of S.'s husband, and the legal title then to vest in S. S. died before her husband, he was held entitled to curtesy.

In *Rochon v. Lecatt*, 2 Stew. (Ala.) 429, there was an ante-nuptial agreement by which the intended husband renounced "all claim, right, title, or interest, to any part or parts of the estate of T., in right of the said A. (his intended wife), she to retain the said property, of whatever nature so ever, for her own use and benefit." It was held by the Court, two judges dissenting, that the right to curtesy had not been surrendered.

In *Tillinghast v. Coggeshall*, 7 R. I. 383, a husband and wife made a settlement of one-half of a landed estate in trust for the sole and separate use of the wife for life, to collect rents and profits, with power to the trustees on the request of the wife to sell and reinvest proceeds as directed by her, and on her death to convey according to the provisions of her will, and in default of a will to convey to her heirs in fee-simple. In case of the death of the husband before the wife, the trust was to cease. The wife made a will in which she gave to her husband, *inter alia*, the income of the property for life, and devised the fee over. Afterwards the trustees purchased the other half of the land, and took a conveyance thereof on the same trusts as those upon which the first half was held. After this the wife died, having attempted to make a will, but having failed through bodily infirmity. It was held that the husband took an estate by curtesy, in the half undisposed of by will. AMES, C. J., remarking, "Whatever doubts were once entertained upon this subject (*Hearle v. Greenbank*, 3 Atk. 718), it seems to be well settled now that the reservation by the wife of the rents and profits of her estate to her sole and separate use during her life, does not amount to an expression of an intent on her part to exclude her husband from curtesy therein after her death. The exclusion of the husband might, if the intent to exclude him had been expressed, have been total, as in *Davis v. Bennet*, 2 P. Wms. 316; but, as in this case the exclusion was partial only, during her life, the Court can have no authority to restrain him from enjoyment of his general right as tenant by the curtesy in the equitable estate in fee of his wife." *Morgan v. Morgan*, 5 Mad. 248; *Pitt v. Jackson*, 2 Bro. C. C. 51; 4 Kent Com. 320, 321.

In *Baker v. Heiskell*, 1 Coldw. 641, where there was a settlement in chancery, by which a trust was created for a wife, her heirs and assigns, giving to the wife the control and possession of the property with a power of appointment, the husband was held entitled to curtesy, his wife having died without exercising the power.

In *Cochran v. O'Hern*, 4 W. & S. 95, there was a trust of land for the

sole, separate, and peculiar use, benefit, and disposal of the wife, and "that the same or any part thereof shall not in any wise be subject or liable to the disposal, intermeddling, control, engagements, debts or encumbrances of him, the said John O'Hern [the husband] . . . ; and it is the true intent and meaning of these presents, that nothing herein contained shall be taken and construed, either at law or in equity, to vest any title, claim, or challenge whatsoever in the said John O'Hern." It was held by the Court that the intent to exclude the estate by the curtesy was sufficiently clear and that the husband took nothing.

The mere expression that the purpose of a trust is the promotion of the interest of married woman and her children, separate and apart from that of her husband, following a trust for the sole and separate use of the wife, will not be sufficient to destroy the estate by the curtesy, *Ege v. Medlar*, 82 Pa. St. 86; and the giving of a power of sale to the wife, will not by itself work a conversion so as to destroy the curtesy, although the execution of the power may have that effect. *Id.*

A devise to a married woman in tail with a provision that on her death without issue the executors shall sell the land for the benefit of the testator's nephews, will not prevent the estate by curtesy from vesting in the devisee's husband, and if she have issue, who all die before her death, the husband will hold after her death, *Hay v. Mayer*, 8 Watts. 203.

Rights of Alien with Reference to Curtesy.

At common law an alien cannot take an estate by the curtesy, *Foss v. Crisp*, 20 Pick. 121; *Reese v. Waters*, 4 W. & S. 145; *Mussey v. Pierire*, 24 Me. 559; *Paul v. Ward*, 4 Dev. 247; *Den ex d. Copeland v. Sauls*, 1 Jones (N. C.) Law 70; naturalization, however, enables the alien to take, *Fish v. Klein*, 2 Mer. 432; *Fourdrin v. Gowdey*, 3 M. & K. 401. It has been held that where an alien husband had declared his intention to become a citizen, during the life of his wife, but had not been naturalized until after her death, he could not take by the curtesy, *Foss v. Crisp, supra*; in that case it was argued that the words of the Massachusetts statute, viz., "when a man and his wife shall be seized . . . the husband shall have and hold such estate during his natural life as tenant by the curtesy" were sufficiently broad to cover an alien husband, but the Court answered, "The statutes of the commonwealth, touching the descent of lands, were intended to apply to citizens not aliens unless they were particularly named."

In *Reese v. Waters, supra*, it was argued that the act of March 24th, 1818, of the Legislature of Pennsylvania, which gave to an alien the right to purchase land subject to a limitation as to quantity, entitled an alien to become

tenant by the curtesy; but the Court held that the word "purchase" was used in the act in its ordinary and popular meaning, and that the alien husband could not take by the curtesy; in the course of its opinion the Court said: "A continuance of this peculiar disability is not recommended by any principle of policy; and the legislature would doubtless put an end to the difficulties of the subject, were it brought before them, by cutting up the root from which they sprung."

Reese v. Waters was decided in the autumn of 1842, and in 1844 the Legislature passed an act, April 16th, 1844, confirming the title of aliens to lands previously purchased, not exceeding 2000 acres, and continuing: "And in all cases where such aliens shall have inherited the same by descent or otherwise, the title of such aliens is hereby confirmed, and it shall be lawful for such alien or aliens to hold as fully to all intent and purposes as any citizen of the United States might or could do." In *Whicheote v. Lyle's Executors*, 28 Pa. St. 73, curtesy was claimed by Sir Thomas Whicheote, an alien; and the case was argued by very eminent counsel. The counsel for the complainant contended that the act had been passed to meet the suggestion of the Court in *Reese v. Waters*, that it therefore was intended to enable an alien to be tenant by the curtesy, and that it was prospective in operation, as shown not only by its general intent, but by the use of the second future tense. The counsel for the defendants argued that the act was merely confirmatory of titles, and that even if the act were prospective, yet as an estate by the curtesy was an estate, neither by descent nor purchase, but by the operation of law, the alien was still excluded from curtesy in Pennsylvania. The case, however, went off on another point, and the Court gave no opinion upon this particular question. So that the law upon the subject may be said to be still unsettled in Pennsylvania. See 2 American Law Mag., p. 46.

In the other States, in those in which all restrictions upon acquiring and holding realty are removed as to an alien, he, of course, takes by the curtesy, where it exists, the same as would a citizen. The States which have so removed restrictions, are Alabama, Code 1876, Tit. 7, ch. 2, § 2860; Florida, M'Clellan's Digest (1881), ch. 92, § 7; Illinois, Rev. St. (Hurd, 1880), ch. 6, § 1, p. 136; Iowa, M'Clain's Annotated Statutes, Pt. 2, Tit. XIII., ch. 1, § 1908; Kansas, Constitution, Bill of Rights, Sec. 17; Maine, Rev. St. 1871, Tit. VII., ch. 73, § 2, p. 559; Maryland, Rev. Code 1878, Art. 45, § 8; Massachusetts, Gen. St. 90, § 38, p. 473; Minnesota, Sts. 1878, ch. 76, § 41, p. 820; Mississippi, Rev. Code, ch. 44, § 1230; Missouri, Rev. St. ch. 3, § 325, p. 49; Nebraska, Comp. Sts. (Brown, 1881), ch. 73, § 54, p. 394; New Jersey, Rev. of 1877, p. 6, §§ 1, 2, 3; North Carolina, Battle's Rev., ch. 3, § 1; Rhode Island, Gen. Sts. 1872, Tit. XXII., ch. 161, § 6, p.

348-9; Texas, Paschal's Digest., 2d edition, Art. 46, p. 106; Virginia Code, ch. 4, Tit. 2, § 18; Wisconsin, Rev. St. 1878, ch. 99, § 2200; West Virginia, Rev. St. 1879, ch. 3, § 1; California, Civil Code 1876, Div. 2, Pt. 1, Tit. 2, ch. 1, § 5671. In those States where restrictions are removed from aliens resident therein, Arkansas Const., Art. I., § 20; Rev. St., ch. III., § 224; New Hampshire, Gen. Law, ch. 135, § 16; Oregon Const., Art. I., § 31; Vermont Const., § 39; or from aliens resident in the United States; Connecticut, Gen. Laws, Tit. 2, ch. 1, § 4; or from aliens, who have declared their intention of becoming citizens, Delaware Laws, Tit. 12, ch. 81, § 5; Kentucky, Gen. Sts. 1873, ch. 14, Art. III., § 1; Tennessee, Sts. Tenn. 1871, Pt. 2, Tit. 1, ch. 2, §§ 1999, 2000; the estate by curtesy would be taken by aliens as any other estate would. In the remaining States, where certain restrictions are placed about the holding of real property by aliens, or where the time of holding is limited, or the method which they are permitted to acquire property distinctly pointed out by statutory enactment, there may be some doubt whether an alien will be permitted to take by the curtesy. [For conditions of holding and acquiring lands by aliens in the various States, see *post*, page 515 *et seq.*]

Incidents. Emblements. Liability for Waste.

Tenant by the curtesy is entitled, as a life tenant, to emblements and is liable for waste, *Armstrong v. Wilson*, 60 Ill. 226; *Bates v. Shraeder*, 13 Johns. 260; and where he has assigned his curtesy, and waste is committed by the assignee, the action by the heir must still be brought against the assignor, *Bates v. Schraeder*, *supra*.

Improvements by Tenant by Curtesy.

If the tenant by curtesy make improvements upon the land, he is not entitled to an allowance therefor, nor is his grantee, *Runey v. Edmonds*, 15 Mass. 291.

Power to Convey or Lease Estate by Curtesy.

The estate by curtesy may be leased or assigned by the tenant, *Shortall v. Hinckley*, 31 Ill. 219, and if the husband convey his curtesy, and afterwards join with his wife in a conveyance of the entire estate, the latter conveyance will not defeat the former, but will carry the wife's remainder only. *Id.* A conveyance of the curtesy by the husband in fraud of his creditors is void, *Stehman v. Huber*, 21 Pa. St. 260, and a voluntary settlement thereof

on his wife is void as to creditors, *Van Duzer v. Van Duzer*, 6 Paige 366; *Wickes v. Clarke*, 8 Id. 161.

Estate by Curtesy bound by a Judgment against the Husband.

The estate by curtesy is bound by a judgment against the husband, and may be taken in execution, *Canby v. Porter*, 12 Ohio 79; *Roberts v. Whiting*, 16 Mass. 186; *Mechanics' Bank v. Williams*, 17 Pick. 438; *Gardner v. Hooper*, 3 Gray 398; *Lancaster Bank v. Stauffer*, 10 Pa. St. 398; *Day v. Cochran*, 24 Miss. 261; *Shortall v. Hinckley*, *supra*; *Lang v. Hitchcock*, 99 Ill. 550. In *Mattocks v. Stearns*, 9 Vt. 326, the question arose under a statute making liable to execution "any estate held by the debtor in his own right, or for his own life, or the life of another, paying no rent therefor." REDFIELD, J., in delivering the opinion of the Court, said: "We see no difficulty in considering this an estate which the debtor held in his own right. The title was indeed derived through the right of his wife; but, by virtue of the marriage, he, as husband, acquired certain rights, among which the use of the freehold estate of inheritance of the wife during the coverture is one. After issue born alive, this estate is enlarged, and extends not only during the coverture, but till the death of the husband, except in one event, which will be named hereafter. This, in England, after the death of the wife, was denominated an estate by the curtesy, but is strictly an estate, which the husband holds in his own right, whether before or after the death of the wife. He may bring trespass or ejectment in his own name for any injury to the usufruct during the continuance of the estate.

"The next inquiry is whether this is an *estate for the life* of the debtor. It is undoubtedly true that this estate might be determined by a divorce *a vinculo*, before the death of either husband or wife. But this is a contingency of so remote expectation, as not to enter into the ordinary calculations of the duration of the relation of married life. It is one of those extreme cases which, like earthquakes and tempests in the natural world, or like public executions, in the history of individual existence, do, indeed, sometimes occur, but which no one feels bound to expect or provide against." The Court, accordingly, held the estate by curtesy to be liable to execution under the statute.

The levy may be made on the land directly, *Roberts v. Whiting*, 16 Mass. 186.

At the present day, since the enactment of the various married women's acts, the tendency in those States where the tenancy by curtesy initiate is still recognized, is to restrain any levy upon or sale of the curtesy initiate by virtue of an execution, and to leave the husband's creditors to wait until

the estate becomes consummate by the wife's death. See Act of Penna. Legislature of April 22, 1850, § 20, P. L. 553; *Clarke's Appeal*, 79 Pa. St. 376; *Woodward v. Wilson*, 68 Id. 208; *Curry v. Bott*, 53 Id. 400; Gen. Sts. Massachusetts, ch. 108, § 1; *Silsby v. Bullock*, 10 Allen 94; *Staples v. Brown*, 13 Id. 64. The effect of an act exempting the wife's lands from levy and sale for debts of the husband during the wife's life, is held to be to prevent the husband during the coverture from conveying his estate by the curtesy, *Williams v. Baker*, 71 Pa. St. 476. Of course in those States where curtesy initiate is held to be abolished, there can be no levy on the husband's estate in his wife's lifetime, for his estate does not arise until his wife's death, and until that event occurs, he has the mere uncertain expectancy of an estate in such lands as remain upon the wife's death, and this is too uncertain a property to be subject to levy and sale. See also *Jones v. Carter*, 73 N. C. 148.

Estate by Curtesy an Insurable Interest.

The estate by curtesy is an insurable interest, *Harris v. York Mutual Ins. Co.*, 50 Pa. St. 341.

Suspension of Descent of Land by Existence of Estate by Curtesy. Effect on Statute of Limitations.

The existence of an estate by the curtesy suspends the descent of the land, and the inheritance cannot be transmitted during said existence, *Bates v. Shraeder*, 13 Johns. 260; *Jackson v. Johnson*, 5 Cow. 74; and during its continuance the statute of limitations will not run against the heirs of the wife, *Miller v. Bledsoe*, 61 Mo. 96; *Witham v. Perkins*, 2 Greenl. 400; *Heath v. White*, 5 Conn. 228; *Jackson v. Schoonmaker*, 4 Johns. 390; *Ege v. Medlar*, 82 Pa. St. 86; *Meraman's Heirs v. Caldwell's Heirs*, 8 B. Mon. 32, or against the wife herself, and if the husband permit an adverse possession to bar his estate, yet the wife's reversion is not barred, and her right of action only accrues upon the death of her husband. See *Foster v. Marshall*, 22 N. H. 491. Where a plaintiff had been under disabilities, and an estate by the curtesy arose before the disabilities were removed, the existence of the curtesy at the time of the removal was held to stop the running of the statute; for the Court regarded the case not as one in which it was sought to tack one disability to another, after the statute had begun to run, but as one in which an intervening estate prevented the vesting of the plaintiff's right, *Jackson v. Johnson*, *supra*, per SAVAGE, C. J., and SUTHERLAND, J., WOODWORTH, J., dissenting.

In some States, Curtesy subjected to Wife's Debts.

In some States, the estate by the curtesy is held to pass subject to the wife's debts, *Philips v. Ditto*, 2 Duv. 549; *Taylor v. Smith*, 54 Miss. 50.

Wife's Right as Creditor as against Curtesy.

The estate will pass to the husband, subject to the right of his wife as a creditor, *Platt's Est.*, 2 W. N. C. 468. S. C. *sub nomine* Shippen and Robbins's Appeal, 80 Pa. St. 391.

Wife not a Necessary Party in Suits with Reference to Curtesy.

In actions or suits with reference to the curtesy, the wife need not be joined, *Shortall v. Hinckley*, 31 Ill. 219.

Tenant by Curtesy cannot Recover for Damage to the Reversion.

Tenant by the curtesy cannot sue for damage done to the reversion, *Mathews v. Bennett*, 20 N. H. 21.

Substitution of Interest of Proceeds where Land is sold by Judicial Proceedings.

Where lands subject to curtesy are sold by judicial proceedings, so as to pass the title free from the curtesy, the interest of the proceeds will belong to the husband for life, *Ellsworth v. Cook*, 8 Paige 643; *Dunscomb v. Dunscomb*, 1 Johns. Ch. 508; *Jacques v. Ennis*, 25 N. J. Eq. 402.

Defeat of Curtesy after Vesting. By Recovery or Fine.

The husband's curtesy will be defeated by a recovery of the wife's land in an action against the husband and wife, or by a valid fine levied, or recovery suffered by the husband and wife. See Tudor, *Leading Cases in Real Property*, p. 66.

Forfeiture by Conveyance of Estate greater than Curtesy.

A conveyance by the husband of an estate greater than his curtesy will forfeit his estate, *Wells v. Thompson*, 13 Ala. 793, but the conveyance must be a tortious one, as a feoffment, and the husband does not forfeit his estate by leasing in fee, or by conveying by a deed operating under the statute of uses, *Grout v. Townsend*, 2 Hill 554; *McKee's Lessee v. Pfout*, 3 Dall. 486; *Flagg v. Bean*, 25 N. H. 49; *Meraman's Heirs v. Caldwell's Heirs*, 8

B. Mon. 32; and it has been held that even a feoffment by the husband during the life of the wife will not work a forfeiture, but will give the feoffee an estate for the life of the husband, *Pemberton v. Hicks*, 1 Binn. 1. On the other hand, it has been held in Maine that a deed in fee by a tenant by the curtesy works a forfeiture, *French v. Rollins*, 21 Me. 372.

Effect of Adultery on Estate by Curtesy.

The estate by the curtesy is not lost by adultery on the part of the husband, *Wells v. Thompson*, 13 Ala. 793, differing in this particular from that of dower, which is lost by elopement, and living with an adulterer. The reason of the difference, as stated by Lord TALBOT in *Sidney v. Sidney*, 3 P. Wms. 276, is that the Statute of Westminster 2, 34 (13 Edw. 1, c. 34), expressly ordains the forfeiture of dower under such circumstances, but no statute makes such an enactment as to curtesy. In Indiana, quite early in the history of that State, this inequality was done away with, and a statute passed depriving the husband of curtesy, if he left his wife and lived with an adulteress, Rev. St. of Indiana, 1838, p. 240; and in West Virginia the curtesy is lost, if the husband desert his wife, unless the desertion be justified by the same cause as would support a decree of divorce, *a vinculo matrimonii*, or *a mensa et thoro*. The estate is restored by a reconciliation. Code W. Va. (1868), ch. 65, § 15, p. 445; Rev. St. (1879), Vol. I., ch. 70, § 16, p. 502. In Pennsylvania, a husband who, for a year or more, previous to the death of his wife, has wilfully neglected or refused to provide for her, or who has maliciously and wilfully deserted her, forfeits his right to curtesy. Act, May 4, 1855, § 5, P. L. 431.

In Maryland the estate by curtesy is forfeited for bigamy. Rev. Code Md., Art. 72, § 102, p. 807.

Effect of Divorce upon Curtesy.

While curtesy is not lost by adultery, it is, however, barred by a divorce *a vinculo matrimonii*. In *Wheeler v. Hotchkiss*, 10 Conn. 225, the question was argued at length and the above position sustained in a well-reasoned opinion by DAGGETT, C. J., as follows: "In this case, Wheeler, the husband had issue born alive before and after she [the wife] became seized of the land, and hence they say that he was tenant by the curtesy initiate. It has its origin, they insist, not simply in the marriage, but in the birth of issue. He may then charge the estate, make a feoffment, hold against the heir of the wife after her death, against the remainderman or reversioner, and even against the king in case of attainder. And again his estate is not termi-

nated by abandoning his wife and living with another woman. For these several positions they cite Co. Lit. 30; 2 Blacks. Com. 127; 1 Rop. H. & W. 15, 45, 48; Swift's Dig. 84; *Sidney v. Sidney*, 3 P. Wms. 376.

"Be it so, that by these authorities those positions are sustained, still all the authorities concur that until the death of the wife he is only tenant by the curtesy initiate and not consummate. The death of the wife is one of the four essentials requisite to constitute a tenant by the curtesy. Now the wife, Mary Wheeler, is still living, and the foundation of the husband's estate is removed by the dissolution of the marriage. The coverture is dissolved by the very act of the husband. By the authority of adjudged cases, as well as for the soundest reasons, his estate could continue only during the coverture, *Starr v. Pease*, 8 Conn. 545. I am satisfied that the right of the wife, which was suspended during the marriage, was restored by the divorce, and, of course, the title to the land is now vested in her." See also *Foster v. Marshall*, 22 N. H. 491.

The destruction of the husband's estate by a divorce *a vinculo* will not be allowed to affect the interests of third parties, acquired on the faith of the husband estate by the curtesy, where the marriage is not destroyed *ab initio*. In *Gillespie v. Worford*, 2 Cold. 632, it was held that a divorce for a cause arising after marriage and not affecting its validity, would not divest the husband's curtesy in the hands of one who had purchased the same from the husband prior to the decree of divorce.

In Nebraska, by statute, Comp. Stat. 1881, ch. 25, § 24, if the divorce *a vinculo* is for the adultery of the wife, the husband retains his curtesy.

A divorce *a mensa et thoro* will not destroy the estate by curtesy, *Rochon v. Lecatt*, 2 Steed. (Ala.) 429.

Curtesy Barred by Divestiture of Wife's Estate on Breach of Condition, but not where a Limited Fee has Expired.

Where the wife's estate is upon condition in deed, and a breach occurs, for which the grantor or his heirs enter, the estate by curtesy is destroyed, for the donor resumes his prior estate, and the derivative estate by the curtesy falls with that out of which it has been derived. A distinction is taken between a case in which the estate of the wife is terminated by entry, or proceedings instituted upon a breach of a condition in deed, and one in which a limited fee is determined in accordance with the term of its creation. In the latter case, the curtesy is allowed to exist notwithstanding the expiration of the fee to which it is attached. This distinction has been rested on the circumstance that in the former case the entry was not the entry after the natural expiration of a previous estate, but for a condition

broken, which destroyed the estate; but in the latter a new estate arose by virtue of the limitation, and, of course, was postponed to all the prior rights of the previous estate, one of which was the estate by curtesy. See Butler's Note 170 to Co. Lit. 241 a; Lord MANSFIELD, in *Buckworth v. Thirkell*, 3 B. & P. 652, note, seemed to recognize the distinction, when, after the case had been twice argued, he said: "It is contended that this is a conditional limitation. It is not, but a contingent limitation. All the cases go upon the distinction of their being conditions and not limitations;" but his Lordship and the other judges nevertheless decided that curtesy would be had in an estate given to the wife and her heirs, but in case she died before the age of twenty-one and without issue, then over, when the wife, having had issue, who died before her, died under the age of twenty-one. The decision in *Buckworth v. Thirkell* is, undoubtedly, in conflict with the authorities cited in Mr. Butler's note, some of which were cited in that case, and in making it the Court seems to have been influenced by a supposed analogy which the estate given to the wife bore to a fee-tail or fee-conditional. The question is involved in considerable difficulty, but it is thought that the distinction above noted, *i. e.*, that between a condition and a limitation is the true one, and that a conditional limitation will follow the rule of the condition. See Preston, Abst. of Title 384; 4 Kent. Com. 33, and in *Boothby v. Vernon*, 9 Mod. 147.

Barring by Joinder of Husband in Deed or Will.

The husband may bar his curtesy by joining with his wife in a deed for her land, *Haines v. Ellis*, 24 Pa. St. 253; or in a will of her realty, his joinder acting as a species of release on his part, *McBride's Est.*, 81 Id. 303. But the husband's joinder in the deed must be in the manner prescribed by law, and in a case wherein it was sought to bar the curtesy, and the husband's joinder in the conveyance was not evidenced by a deed, it was held that the curtesy was not barred, and that no estoppel would arise against the husband by reason of the fact that the wife, with his consent, took in part payment for the land a promissory note made by her husband to a third person, *Houck v. Ritter*, 76 Pa. St. 280.

Where a conveyance is made by virtue of a power of attorney, made by husband and wife to transfer all their right, title, and interest in certain land of the wife, the estate by curtesy will be defeated, no matter how defective the power may be as to the wife, or how ineffectual to pass her estate, *Jackson v. Hodges*, 2 Tenn., Ch. 276.

Where a husband, tenant by curtesy initiate, joined with his wife in a conveyance of her land and agreed that property purchased with the pro-

ceeds thereof should be conveyed to his wife, in trust for her and her children by a former husband, it was held that the husband took no curtesy in the newly acquired land, and that if, in violation of his agreement, he took title to himself, he would be compelled to account for the proceeds of the estate even during the lifetime of the wife, *Carpenter v. Davis*, 72 Ill. 16.

But where a post-nuptial contract secures to a wife the control of all her realty and releases curtesy, and the wife sells her property and dies, the release will not be held to be a bar to the husband's right to his share of the wife's personalty, even though the personalty be the proceeds of the sale of the land, *Rice v. Rice*, 2 W. N. C. 672.

Curtesy not Barred by an Ante-nuptial Deed in Fraud of Husband.

Where a woman, on the day of her marriage, and before its solemnization, conveyed her property without consideration, it was held by the Court a fraud upon the husband, and the fact that the grantee afterwards bequeathed a legacy to the wife, which she, with the assent of her husband, received, did not estop him from claiming his curtesy in the land after his wife's death, *Robinson v. Buck*, 71 Pa. St. 386.

Not Barred by any Act or the Attainder of the Wife after Birth of Issue.

The husband's estate, after it has become initiate, is not barred by the attainder of the wife or any other thing working a forfeiture of the wife's estate, *Lancaster Bank v. Stauffer*, 10 Pa. St. 398; *Wells v. Thompson*, 13 Ala. 793; *Foster v. Marshall*; or by any act of the wife after birth of issue, *Stewart v. Ross*, 50 Miss. 776; the attainder of the wife before birth of issue will, however, defeat the estate by curtesy, *Gillespie v. Worford*, Co. Lit. 40 a, 351 a; 4 Hawk. Pl. Cr. 783; Vin. Abr., Tit. Curtesy, A; and a pardon will not entitle the husband to claim curtesy except as to after acquired land, 1 Bright, Husb. and Wife, 160; *Gate v. Wiseman*, Dyer 140 b; Co. Lit. 392.

Loss of Curtesy by Felony or Treason of Husband.

The tenant by the curtesy might, formerly, forfeit his estate by a felony, *Foster v. Marshall*, 22 N. H. 491.

Where the tenant by the curtesy initiate commits treason, and is attainted, he loses his estate, but it is not forfeited to the commonwealth, but passes to the wife and her heirs discharged of the curtesy, *Pemberton v. Hicks*, 1 Binn. 1.

Curtesy not Barred by a Will of the Wife.

As the estate by curtesy antedates any will of the wife, which takes effect from her death, the wife's devise will not affect her husband's curtesy, and this has been held even where the husband's estate is limited to the land of which the wife dies seized, *Hall v. Hall*, 32 Ohio 184. On the same principle the wife's conveyance, after issue born, will not affect the estate, but the law is otherwise where the estate is limited as above stated, *Forbes v. Sweesy*, 8 Neb. 520.

Or by a Decree enjoining Husband from Intermeddling in the Wife's Property.

The husband's curtesy in an estate of which the absolute control is vested in the wife is not barred by a decree, made during the wife's life, enjoining the husband from intermeddling with the property, *Rochon v. Lecatt*, 2 Stew. Ala. 429.

Curtesy not Transferable by a Disclaimer.

As the estate by curtesy partakes of the character of a descent rather than a purchase, and becomes consummate immediately upon the death of the wife, it cannot be transferred by a disclaimer, whose office is rather to prevent an estate from vesting than to convey one already vested, *Watson v. Watson*, 13 Conn. 83.

Barred by Statute of Limitations.

The estate may be barred by the Statute of Limitations, *Neal v. Robertson*, 2 Dana 86; *Lessee of Thompson's Heirs v. Green*, 40 Ohio St. 216; *Shortall v. Hinckley*, 31 Ill. 219.

Or by Statutory Judicial Proceedings, the Tenant being made a Party thereto.

It may be barred by statutory judicial proceedings, whereby the land is ordered to be sold free from the curtesy, and the interest of the proceeds given to the husband, but unless the tenant by the curtesy be a party to the proceedings and the adjudication is made with reference to him and his estate, the curtesy will not be barred, *Jacques v. Ennis*, 25 N. J. Eq. 402.

Not Lost by Abandonment of Possession to Cotenant in Common.

The tenant by the curtesy does not lose his estate by abandoning possession of the land to a cotenant in common, *Witham v. Perkins*, 2 Me. 400.

Statutory Provisions.

The estate by curtesy has in this country been very much altered by statutes in the various States. The mainspring of the alteration has been the tendency to increase the power of married women over their real property. In some States the alteration has been effected directly by statutes having express reference to the curtesy; in others, indirectly by the operation of the various married women's acts. Some States have even gone so far as to abolish the estate by the curtesy altogether, as Iowa, M'Clain's Annotated Stats., § 2440, p. 653; Illinois, Rev. St. 1880, ch. 41; Minnesota, Act 1875, ch. 40, § 5; Stats. 1878, ch. XLVIII., ch. XLVI., § 3, and in these States the husband is given in lieu of curtesy an estate in fee-simple of one-third of his wife's land possessed by her, and not sold on judicial sale, or in which he has not relinquished his right; California, Civil Code (1876), § 5173, p. 595, Act April 17th, 1850; Mississippi, Rev. Code 1880, ch. 42, § 1170, p. 339; Kansas, Comp. Laws 1879, ch. 33, § 28, p. 380; and by implication in Georgia, where the wife leaves children, Code 1873, ch. III., Art. 1, § 2484; in Florida, where it is provided that the husband shall take in his wife's lands the share, Laws Flor., Div. II., Tit. V., ch. 1, § 7 (Thomp. Dig.), and in Colorado by an enactment that the wife may not leave away from husband more than one-half her estate, without his consent in writing, Gen. Laws, ch. LXIV., § 4, p. 614.

The general tendency, however, is not to utterly abolish the estate by curtesy, and in some of the married women's acts it is expressly preserved, while others are held to preserve it by construction. In some States the effect of the legislation is held to be to destroy curtesy initiate without depriving the husband of his right to the land after the wife's death. The following is a brief review of the law as affected by statute:

In Alabama, the Code, 1876, Tit. 5, ch. 1, § 2714, provides that if a woman having a separate estate die intestate, her husband shall be entitled to the use of the real estate for life, unless he has been divested of all control of the wife's estate by a decree in chancery, as provided by § 2717 of the Code, which enacts that the husband may be deprived of the care and management of his wife's separate estate on proof of imbecility, intemperance, or anything else, "which renders him unfit for the management" of said estate.

The imbecility or intemperance must be such as renders the husband unfit for the management, and is not enough, *per se*, to justify a decree, nor is his adultery or cruelty, *Bryan v. Bryan*, 35 Ala. 290; but as said by WALKER, C. J., "the management which the law contemplates does not have relation alone to the control of the trust; but it has relation also to the purposes to be subserved by the trust," and, therefore, where the hus-

band, without adequate cause, abandons his wife, a decree depriving him of the control of her property will be made, *Boaz v. Boaz*, 36 Ala. 334. By Section 2713 of the Code, a married woman has unlimited power to dispose of her separate estate. So that curtesy would seem to be reduced, in Alabama, to a life share after the wife's death, in what she has not disposed of by deed or will.

In Indiana, the husband's separate deed passes no interest in the wife's land. Revision of 1876, Vol. I., ch. 144, § 6, p. 550, and a married woman may, without the assent of her husband, devise land; Acts May 31, 1852; Act 1859, pt. 5, Rev. 1876, Vol. II., ch. 3, § 1, p. 570, which would seem to confine the curtesy to an interest after the wife's death in the undisposed of realty.

In Kentucky curtesy is limited to lands owned and possessed by the wife at the time of her death, Rev. St., Art. 4, ch. 47, p. 22.

In Massachusetts, Gen. Stats., ch. 108, §§ 3, 10, p. 538; Oregon, Gen. Laws, ch. 64, § 3, p. 788; Pennsylvania, Act April 11, 1848, § 10, 2 Pur. Dig. 1007, pl. 17. Rhode Island, Pub. St. (1882), Tit. XX., ch. 166, § 14, p. 424, Tit. XXIV., ch. 182, § 3, p. 471. Tennessee, Statutes, Vol. I., p. 1119, § 2486, in the married woman's acts the estate by the curtesy is expressly saved, and the effect of the saving is that where a married woman is given power to convey her land, the conveyance will be subject to the husband's estate by the curtesy, *Beal v. Warren*, 2 Gray 447; *Comer v. Chamberlain*, 6 Allen 166.

In Michigan, by statute, curtesy is given in land of which the wife dies seized, and no birth of issue is necessary to the vesting of the estate; but if the wife leave, at her death, issue by a former husband to whom her land might descend, such issue will take the land discharged of curtesy, 2 Comp. Law (1857), ch. 90, § 30, p. 856, Comp. Laws 1871, ch. 151, § 30, *Hathon v. Lyon*, 2 Mich. 93, *Hill v. Chambers*, 30 Mich. 422. While the law as thus established by statute has never been expressly repealed, or the estate by the curtesy abolished, yet it has been held abrogated by the various statutes relating to married women's estates. See *Tong v. Marvin*, 15 Mich. 60, in the course of the opinion in which case COOLEY, J., reviews the legislation on the subject; it may be noted, however, that the learned judge relies to a certain extent on some New York cases, which have since been overruled, and see *Brown v. Clark*, 44 Mich. 309.

In Nebraska, the phraseology of the act with reference to curtesy is the same as the one held to be abrogated in Michigan, viz.: "When any man and his wife shall be seized in her right of any estate of inheritance in lands, the husband shall, on the death of his wife, hold the lands for his life as tenant thereof by curtesy; *Provided*, That if the wife, at her death, shall

have issue by a former husband, to whom the estate might descend, such issue shall take the same discharged from the right of the surviving husband, and hold the same as tenant by curtesy." Comp. Stat. (1881), ch. 23, § 29, p. 215.

The Act of March 1, 1871, relating to married women, Comp. Stat. (1881), ch. 53, § 2, conferred on a married woman the right to convey her real property, and enter into contracts, with regard to the same, with like effect as could a married man with reference to his land.

In view of this statute, it is held that in Nebraska the estate of the curtesy still exists in lands undisposed of the wife in her lifetime, but will be taken subject to her contracts; and hence, where the wife, having made a lease of her land, dies, the surviving husband will have no right to the possession of the land until the term of the lease has expired, *Forbes v. Sweesy*, 8 Neb. 520.

In Ohio issue is not necessary, but if there be issue by a former husband, the surviving husband shall not have curtesy, unless the estate in which it is claimed came to the wife by a gift from him, or from his ancestor, Rev. St. 1880, § 4176, p. 1046. For a view of the estate in Ohio prior to the enactment of the law now in force, see *Denny v. McCabe*, 35 Ohio 576.

In New Jersey it has been decided that the married woman's act (Nixon's Dig. (1852) 503, Stewart's Revision (1877), p. 639, § 14) abolished the estate by curtesy initiate, but did not affect the right of the husband in his wife's land, upon her death, *Porch v. Fries*, 18 N. J. Eq. 204; *Johnson v. Cummins*, 16 Id. 97; *Ross v. Adams*, 4 Dutch. 160; *Naylor v. Field*, 5 Id. 292.

In Minnesota the act abolishing curtesy saved all vested rights, Stats. 1878, ch. XLVIII.

In Mississippi the Revised Code of 1871, ch. 23, §§ 1786-7, provided that the husband should have curtesy in land of which the wife died seized, and that if there was surviving issue by a former husband, the curtesy should be in but one-third of the estate. The statute of Feb. 19, 1867, gave the wife a right to devise her land without the assent of the husband, while the married woman's act, Code, 1857, Art. 23, p. 335, saved the curtesy. The effect of this legislation was thus stated in *Stewart v. Ross*, 50 Miss. 776, by SIMRALL, J., "as we interpret the statutes, the right of the husband does not become initiate of a life estate on the birth of issue, in the sense of being fixed and vested, but it is contingent to take effect on the death of the wife in all the lands of which she died seized, or possessed, that are not disposed of during the coverture, and not devised by will." By the Code of 1880, ch. 42, § 1170, p. 339, the estate by the curtesy was abolished.

Under the New York married woman's act (Act April 7, 1848), it was,

for a long while, a matter of doubt as to whether the estate by curtesy were abolished, highly respectable authorities differing on the question. In *Thurber v. Townsend*, 22 N. Y. 517, it was held that the statute had destroyed the curtesy initiate, and in *Billings v. Baker*, 28 Barb. 343, a department of the Supreme Court held that, as under the act the husband had no seizin of his wife's land during her life, there was wanting one of the four essentials of curtesy, and there being no estate initiate in the wife's lifetime, there could be none to become consummate at her death. See also *Colvin v. Currier*, 22 Barb. 371; *In the matter of Winne*, 1 Lans. 508. On the other hand, while it was admitted that the estate by the curtesy initiate was abolished, it was held that the estate by the curtesy after the wife's death still existed, *Hurd v. Cass*, 9 Barb. 366. See also *Clark v. Clark*, 24 Barb. 581; *Lasing v. Gulick*, 26 How. Pr. 250; *Jaycox v. Collins*, Id. 497; *Beamish v. Hoyt*, 2 Robt. 307. In *Burke v. Valentine*, 52 Barb. 412, the Supreme Court in the first department, carefully considered the question, reviewed the authorities, INGRAHAM, P. J., delivering the opinion, and decided that the estate of the curtesy was not abolished as to realty of the wife, not disposed of at the time of her death. This decision was affirmed by the Court of Appeals (see 6 Alb. Law Journal 167), which has since announced the same doctrine in *Hatfield v. Sneden*, 54 N. Y. 280, and may be regarded as having settled the law. See also a dictum in *Ransom v. Nichols*, 22 N. Y. 110; and see *Leach v. Leach*, 28 N. Y. S. C. 381, *Barnes v. Underwood*, 47 N. Y. 351.

In Vermont, curtesy is as at common law, with the provision that in the event of issue by a former husband, so much of the estate of the wife as might have descended to said issue, shall be discharged from the curtesy, Laws Vt., Tit. XVI., ch. 55, § 15, p. 414, and see Revised Laws (1880), Tit. 15, ch. 114, § 2229, p. 452.

In Wisconsin, the husband's curtesy is confined to lands of which the wife dies seized and intestate, and a proviso to the same effect as that in Vermont, where issue by a former husband survive the wife, exists, Rev. Stats. (1878), ch. 98, § 2180, p. 628.

In West Virginia the husband's right to curtesy is limited to lands of which the wife dies seized, Rev. St. (1879), ch. 70, § 15.

In Maine the statute upon curtesy is as follows: "When a man and wife are seized of lands in fee in her right, acquired before March 22, 1844, which are under improvement, and issue is born alive of her body that may inherit the same, the husband shall hold such estate after his wife's decease during his life as tenant by the curtesy. The husband of a deceased wife, whose estate is solvent, shall have the use for life of one-third of her real estate, to be recovered and assigned in the same manner and

with the rights of dower, and shall have the same right to waive any provision made for him in her will that a wife has in regard to her husband's will. When a husband or wife dies intestate, leaving no issue, and the estate is solvent, the survivor shall have the use for life of one-half of the real estate of the deceased, to be recovered and assigned in the manner and with the rights of dower," Rev. St. (1871), Tit. IX., ch. 103, § 15, p. 758.

In Connecticut, Laws, Tit. 18, ch. 11, § 18; Delaware, Rev. Code, ch. LXXXV., § 1, cl. 6; New Hampshire, Gen. Laws (1878), ch. 202, § 14, p. 475; North Carolina, Battles' Revision, ch. 69, § 30, p. 592; and Rhode Island, Pub. Stats. (1882), Tit. XX., ch. 166, § 14, p. 424; Tit. XXIV., ch. 182, § 3, p. 471, ch. 187, § 8, p. 490, the husband's right to curtesy is recognized as at common law, and the nature of the estate does not seem to have been materially altered by subsequent legislation.

Dower.

THOMPSON *v.* MORROW.

Supreme Court of Pennsylvania, September 6, 1819.

[Reported in 5 Sergeant & Rawle 289.]

A wife is not barred of her dower by a conveyance in which she joins with her husband, if she is not privately examined by the magistrate who takes her acknowledgment. The widow in the assignment of her dower against a purchaser from her husband, shall take no advantage of improvements of any kind made by the purchaser, but, throwing those out of the estimate, she shall be endowed according to the value, at the time her dower shall be assigned to her.

THIS was a writ of error to the Court of Common Pleas of Allegheny County, in an action of dower brought by Elizabeth Thompson widow of Moses Thompson deceased, against William Morrow, in which two bills of exceptions were taken by the plaintiff in the Court below.

This case had been previously twice argued, and TILGHMAN, C. J. being prevented by sickness from attending at this term, he sent his opinion, which was read by GIBSON, J. as the opinion of the Court.

TILGHMAN, C. J.—The record in this case presents two bills of exception, taken on the trial of this cause, in the Court of Common Pleas of Allegheny County. It is an action of dower, brought by Elizabeth Thompson, widow of Moses Thompson deceased. 1. A deed from the said Moses Thompson and Elizabeth his wife, (the plaintiff,) conveying in fee simple the land in which dower is now demanded, to Robert Henderson, under whom the defendant claims, having been given in evidence by the defendant, the Court were of opinion, that by virtue of this deed, the plaintiff was barred of her dower, although it did not appear, that she was privately examined, by the justice of the peace who took her acknowledgment. This point having been decided in the case of *Kirk v. Dean*, 2 Binn. 341, and that decision recognized

by this Court in several subsequent cases, it is unnecessary at present, to say anything more, than that we consider the law as settled. There was error, therefore, in the decision of the Court of Common Pleas.

2. After the conveyance by Moses Thompson to Robert Henderson, the land in which dower is claimed, (being a lot of ground in the city of Pittsburgh,) was increased in value by the erection of buildings. And the value was, besides, greatly increased, by the growth of the city and other causes, distinct from any buildings or improvements made by the purchaser. The Court of Common Pleas were of opinion, that in assigning dower to the plaintiff, no regard was to be had to the gradual increase of value from causes unconnected with improvements made by the purchaser, but that the plaintiff was to have one-third, according to the value at the time of the alienation by Moses Thompson. It is a point of great importance to widows, and to all those who purchase from married men without legal conveyances from their wives. We have, therefore, had it twice argued, in order that we might avail ourselves of the industry and talents of the learned counsel on both sides. Dower is a claim founded on law, and favored by courts both of law and equity. It is a right flowing from marriage; and marriage is so highly regarded as to be a valuable consideration for the settlement of property on the wife. By marriage, the husband acquires an absolute right in his wife's *personal* estate, a right to the possession and profits of her *real* estate during the coverture, and also a right to her real estate during his life, in case he survives her, provided he has issue by her, and the estate be of such a nature, that the issue may, by possibility, inherit it. In return for all this, the law gives to the wife, in case she survives her husband, one-third for her life, of all the real estate whereof her husband was seized at any time during the coverture, whether she have issue by him or not, provided the estate be of such a nature, that any issue which might have been born, might, by possibility, have inherited it. The right of dower is inchoate, on the marriage, but not consummate till the death of the husband. No act of the husband can lessen or defeat it. But, during the marriage, his right is absolute; he may improve the estate, or suffer it to lie waste; erect buildings or pull them down at his pleasure. All that the wife can claim, where the husband dies seized, is one-third of the land in the condition in which it is found at the time when her title is complete, *viz. at the death of her husband*. But if after her title is thus complete,

and before assignment of dower, the heir erects buildings, or makes other improvements, the widow shall be endowed of one-third part of the estate, according to its value *at the time dower is assigned to her*; because it was the folly of the heir to make improvements on land which he knew to be subject to dower. Co. Litt. 32 a, sect. 36. The law is different, however, when the husband aliens the land during coverture, for there the wife shall derive no advantage from any improvement made by the alienee. There is no injustice in this, for, if the husband had never aliened, he might not have made these improvements. And it would affect the prosperity of the county, by discouraging improvements in building and agriculture, if the wife were to be endowed of one-third of the value, including these improvements. This I take to have been the main reason for excluding the wife from any part of the value arising from improvements; although we find in the old books, another reason assigned, that is to say, that as the tenant in dower, who vouches the heir on a warranty of his ancestor, must recover of the heir, according to the value of the land, *at the time of the alienation*, it would be unreasonable that the widow should recover of the tenant according to any other value. So far as concerns improvements made by the alienee, it is agreed that the tenant shall be protected from this hardship; but as to any value which may chance to arise, from the gradually increasing prosperity of the county, and not from the labor or money of the alienee, it would be hard indeed upon the widow, if she were precluded from taking her share of it. She runs the risk of any deterioration of the estate, which may arise either from public misfortune, or the negligence, or even the voluntary act of the alienee; for although he destroy the buildings erected by the husband, the widow has no remedy, nor can she recover any more than one-third of the land as she finds it at the death of her husband. Perk., sect. 829. There are not many authorities on this subject to be found in the English books, and such as we have are bottomed on decisions said to be reported in the year-books. Mr. Hargrave in his note on Co. Litt. 32 a, sect. 36, cites 1 H. 5, 11, 17, E. 3, 17 H. 3, Dower, 192, 31 Ed. 1, vouch. 288. "If the feoffee improve by buildings, yet dower shall be, as it was in the seizin of the husband, for the heir is not bound to warrant except according to the value as it was at the time of the feoffment; and so the wife would recover more against the feoffee, than he would recover in value, which is not reasonable." It is to be remarked, that the *de-*

cision in the cases here cited, was upon *improvements by buildings, erected by the feoffees*; the decision, therefore, was clearly right, although a better reason might, perhaps, be given, than that which is said to be assigned for it, in the year-books. In Jenk. Cent., pp. 34, 35, case 68, in which the year-book 47 E. 3, 22, is cited, we have the law laid down as follows: "On voucher, if special matter be shewed by the vouchee, viz. that the land at the time of the feoffment was worth only £100, and now at the time of the voucher, is worth £200, *by the industry of the feoffee*, the tenant shall recover only the value *as it was at the time of sale*, for, *if the act of the feoffee has meliorated the land, this shall not prejudice the feoffor in his warranty*." Here is satisfactory reasoning indeed. The warrantee shall not, by any *acts of his own*, increase the responsibility of the warrantor, for that would, in effect, be to alter the contract of warranty. But even granting that the tenant, who vouches the heir, can recover from him only according to the value *at the time of the alienation*, this being the true construction of the warranty, the wife of the feoffor, who is no party to the warranty, ought not to be injured by it. So far as her rights are concerned, she ought not to be affected, but by those reasons of policy and justice, which apply to her case; reasons which extend only to *improvements made by the feoffee*. As the year-books are principally relied on, by those who contend, that the widow is to recover, according to the precise value at the time of the alienation, I endeavored to trace the subject through those books, but met with great difficulty, from the imperfection of the printed editions. I believe I have seen all which have ever been printed, but it appears by a report of a committee of the British House of Commons, appointed for the purpose of enquiring into the state of the public records, in the year 1800, that although there are year-books, from the reign of Edward I., (inclusive) to the first of Henry VIII., yet in the printed editions, there are the following chasms: the whole reign of Edward I., (except some short notes in the exchequer:) of the reign of Edward III., ann. 11 to 16, ann. 19, 20, and 31 to 37; whole reign of Richard II., of Henry V., ann. 3, 4, and 6; of Henry VII., ann. 17, 18, 19. And it appears from the same report, that in some instances, the manuscripts contain different reports of the same cases. It is to be remarked in general of such reports, as we have in these books, that they are often so short as to be obscure and unsatisfactory. With respect to dower, however, I have found no adjudged case in the year-books confining

the widow to the value at the time of the alienation by her husband, where the question did not arise on *improvements made after the alienation*. In our own State, it does not appear, that the point now in question has been decided, although I have certainly considered the general understanding to be, that the widow should have the advantage of all increase of value, not arising from improvements made after the alienation. And such I know to have been the opinion of my deceased colleagues, Judges Yeates and Brackenridge. As to the case of *Winder v. Little*,¹ Yeates 154, although the point on which the Court decided is not expressly stated, yet enough appears to satisfy me, that it was a question on *improvements*. By the Supreme Court of New York, justly commanding the highest respect, the law has been held differently. But they have a statute of their own, by which this matter is regulated. It is true, that Court, in delivering its opinion, did say, that the statute made no change in the common law: still, however, the decision was upon the statute, and therefore, what was said of the common law, ought not to be considered as more than a *dictum*. The New York cases on this subject, will be found in 2 Johns. 484; 11 Johns. 510; 13 Johns. 179. In Massachusetts, the Supreme Court have in several cases decided, that so far as concerns *buildings, or other improvements*, the widow shall take her third according to the value, exclusive of the improvements, 9 Mass. Rep. 218; 9 Mass. Rep. 8; 10 Mass. Rep. 80; 13 Mass. Rep. 227. But as to increase of value not arising from improvements, the opinion of the late Chief-Justice Parsons may be collected from what fell from him, in the case of *Gore v. Brazier*, 3 Mass. Rep. 544. His words are these: "If the husband during coverture, had aliened a real estate in a commercial town, and at his death the rents had trebled, *from causes unconnected with any improvement of the estate*, and the widow should then sue for her dower, perhaps it might be difficult for the purchaser to maintain, that one-ninth only, and not one-third should be assigned to her." I am not aware that this opinion has ever been contradicted in Massachusetts, and therefore, I presume that the law is held there, in conformity to it. Having considered all the authorities which bear upon this question, I find myself at liberty to decide, according to what appears to me to be the reason, and the justice of the case, which is, that the widow shall take no advantage of *improvements of any kind*, made by the purchaser, but throwing these out of the estimate, she shall be endowed, according

to the value, at the time her dower shall be assigned to her. The judgment is therefore reversed, and a *venire facias de novo* awarded.

Judgment reversed, and a *venire facias de novo* awarded.

According to Sir Henry Maine, dower, as it exists with us, is the result of the exertions of the church in the interest of wives surviving their husbands; the church first insisted that the husband, at the time of the marriage, should formally and expressly promise that he would make a provision for his wife, and afterwards succeeded in having the principle of dower engrafted upon the customary or common law of western Europe. Maine, *Ancient Law* (3d Am. Ed. 1875), Ch. VII., p. 218.

Dower ad ostium ecclesiæ.

Having such an origin, it is not remarkable that the earliest species of dower, of which we have an authentic account, is the dower *ad ostium ecclesiæ*, which is mentioned by Glanville. See Reeves, *History of the English Law*, ed. Murphy, Phila., 1880, Vol. I., pp. 354-5. In it, the husband endowed his wife openly and before the church, and either specified the dower or he did not. If no especial dower were named, the dower was understood to be of one-third of the freehold, of which the husband was seized in desmesne at the time of the marriage, and he was not permitted to give a dower greater than such one-third, although he might give less; and of property which the husband afterwards acquired, the wife could claim no dower, unless there had been a provisional mention of such acquisitions at the time of the endowment, Glanv. lib. 6, c. 1.

In Littleton's time, however, the liberty of the husband, with reference to this species of endowment, had become enlarged, so that he could endow his wife "of his whole land, or of the half or other lesser part thereof," Lit., Sec. 39; and this was the law in the time of Coke, Co. Lit. 34 a.

To give validity to this form of endowment, it was necessary that it should be made openly in the face of the church, by a man of full age, or, if he were an infant, with the consent of his guardian, and after affiancing and troth plighted between the husband and wife, Id. It resembled the dower at common law in many things, but differed in others, notably in the following respects, viz., if the wife wished to prevent her dower being barred by a conveyance of her husband, she was obliged to make a solemn decla-

ration of dissent from the conveyance ("contradicere," Glanville), which would enable her, the sale being afterwards made, to claim dower against the purchaser; the heir was obliged, if it could be done, to deliver to the widow possession of the specific land assigned by the husband, and, if that were impossible, to make the widow a recompense in value, *excambium*, Reeves, Vol. I., pp. 356-7; and on the death of the husband, the widow had a right of entry upon her dower lands without further assignment thereof, Co. Lit., Sec. 39, 34 a.

Dower ex assensu patris.

Dower *ex assensu patris*, resembled, generally, dower *ad ostium ecclesiæ*. It was made by the husband, who was heir-apparent to his father, of parcel of his father's lands and tenements, with the assent of the father, Lit., Sec. 40; and a like endowment might be made *ex assensu matris*, Co. Lit. 35 b.

Disclaimer of foregoing Species of Dower—Their Abolition.

Both of these species of dower, when dower by the common law had become the law of the realm, might have been disclaimed by the widow, and on such disclaimer she became entitled to dower at common law, Co. Lit., Sec. 14, 36 a. They afterwards, and probably for that reason, fell into disuse, and were abolished in England by statute of 3 and 4 William IV., c. 105, § 13. They seem never to have obtained in the United States. They may, however, be considered as furnishing the foundation upon which jointures, which in many respects resemble these antique forms of dower, arose.

Dower de la plus belle.

Littleton also mentions, Co. Lit., Sec. 48, 38 a, another species of dower, *i. e.*, dower *de la plus belle*, which was abolished, in effect, by the Stat. 2 Car. 2, c. 27, by which tenures by knight's service were converted into soccage.

Dower at Common Law.

Dower, at the common law, as we have it, was a matter of growth. Starting with the *rationable dos* of Glanville, *i. e.*, a third part of the freehold of which the husband was seized on the day of marriage, it is, in the reign of Edward III., spoken of as a third of all that was the husband's in his lifetime, held either in fee-simple or in fee-tail, Reeves, Vol. III., p. 523. In Henry VI.'s time, Littleton gives the following definition: "Tenant in

dower, is where a man is seized of certain lands or tenements in fee-simple, fee-tail general, or as heir in special-tail, and taketh a wife and dieth; the wife, after the decease of her husband, shall be endowed of the third part of such lands and tenements as were her husband's at any time during the coverture; to have and to hold to the same wife in severalty, by metes and bounds, for the term of her life, whether she hath issue by her husband or not; and of what age soever the wife be, so as she be past the age of nine years at the time of the death of her husband, otherwise she shall not be endowed," Littleton, Sec. 36, 30 b. This definition is afterwards extended to land held by the husband as *donee* in tail-special, when, by the limitation of the estate, the heirs were to be begotten on the body of the wife, who claimed dower, Sec. 53, 40 a; the test being, that issue which the wife might, by possibility, have, should be capable of inheriting the estate by the terms of its limitation.

Blackstone's definition, Bl. Com., Lib. 2, p. 129, is defective, in that, if taken literally, and without the explanation which he afterwards gives on p. 131, it would cover a life estate. Mr. Tudor's definition, in his note to Lewis Bowles's case, Tudor's Leading Cases on Real Property, p. 68, is at once concise and clear. He thus defines dower: "The estate that a widow (if not debarred of such estate) is entitled to have assigned to her for life in one-third of the hereditaments, which her husband is seized of in fee-simple or fee-tail, and which her issue, if any, might, by possibility, inherit."

Dower, as at common law, has been recognized in all the States of the Union which derive their law from England. In some it is expressly recognized by statute. See Massachusetts, Pub. Stats. (1882), Pt. 2, Tit. 1, Ch. 124, § 3, p. 740; Virginia, Code, Tit. 31, Ch. CVI., § 1, p. 853; North Carolina, Battle's Rev., Ch. 117, § 1, p. 839; Ohio, Rev. St., Pt. 3, Tit. IV., Ch. 3, § 4188, p. 1049; Rhode Island, Laws (1882), Tit. 29, Ch. 229, § 1, p. 637; West Virginia, Rev. Sts., Vol. 1, Ch. 70, § 1, p. 498; New Jersey, Rev. of 1877, p. 320, Pl. 1; New York, Rev. Stat. (1882), Pt. 2, c. 1, Tit. 3, § 1, p. 2197; Nebraska, Comp. Stat., Pt. 1, c. 23, § 1, p. 212; Oregon, Stats., Ch. 17, Tit. 1, § 1; New Hampshire, Gen. Stat., Ch. 202, § 2, p. 474; Michigan, Comp. Laws, Vol. 2, Tit. XXII., Ch. CLI., § 4269, p. 1359; Wisconsin, Rev. Stat., Pt. 2, Tit. 20, Ch. 98, § 2159, p. 626; Missouri, Rev. Stat., Vol. 1, Ch. 29, § 2186, p. 363; Alabama, Code (1876), Pt. 2, Tit. 3, Ch. 2, Art. 1, § 2232; Maine, Rev. Stat. (1871), Tit. IX., Ch. 103, § 1, p. 756; Arkansas, Rev. Stat., Ch. XLIX., § 2210, p. 455; Delaware, Rev. Code (1874), Ch. LXXXVII., § 1, p. 533; Florida, McClellan's Digest, Ch. 95, § 1.

Dower was also given, as at common law, by the federal ordinance of

1787, under which the great north-western territory of the United States was organized. See *May v. Rumney*, 1 Mich. 1; *Betts v. Wise*, 11 Ohio 219.

Variation of the Common Law Rule.

In some of the above States, the common law has been slightly varied as to the character of the land, or the nature of the estates in which dower may be had, as will appear more fully in the appropriate places.

The Alabama Code contains a rather peculiar provision with reference to dower; by it, if the widow has a separate estate of a value greater than her dower and distributive share of her husband's estate, estimating the same at seven years' purchase, no dower or distributive share can be taken by the widow; if the separate estate is less, she will be given enough from the husband's estate to render her estate equal to what she would receive under the law, if she had no separate estate, Code, Pt. 2, Tit. 5, Ch. 1, Art. III., § 2715. This applies only to separate estates created by law, *Smith's Exr. v. Smith*, 30 Ala. 642, and does not embrace a separate estate, made so by the acts of the parties or by a will, Id.; *Huckabee's Admr. v. Andrews*, 34 Id. 646.

In Vermont, Rev. Laws (1880), Tit. 15, Ch. 114, § 2215, p. 449; Tennessee, Stats. (T. & S. 1871), Pt. 2, Tit. 3, Ch. 3, § 2398, p. 1073; Connecticut, Gen. Stat. (Revis. of 1875), Tit. 18, Ch. 11, Art. IV., § 1, p. 376; *Widow Deforest's Appeal*, 1 Root 50; Georgia, Code (1873), Pt. 2, Tit. 2, Ch. 1, Art. 2, § 1763, dower is limited to lands or realty of which the husband was seized or possessed at the time of his death; except that in Georgia, it also includes lands of which the husband became possessed in the right of his wife, though aliened during coverture.

Dower in some States Abolished.

In Mississippi, by the Revised Code (1880), Ch. 42, § 1170, p. 339, dower, "as heretofore known," is abolished, and the word dower is, when used in the code, declared to mean the statutory interest in the land of a husband given, after his death, to his wife, Id. § 20. See *Quin v. Coleman*, 42 Miss. 386.

Dower is abolished in Indiana, Ch. 98, § 16; Kansas, Comp. Laws (1879), Ch. 33, § 28 (2129), p. 380; California, Civil Code, Ch. III., § 5173; Minnesota, Gen. Stat., c. 48, p. 572 (the abolishing act in this State saves all vested rights); Nevada, Comp. Laws, Vol. 1, Ch. XXII., § 157, p. 57.

In some of the States, the widow has been left entirely at the mercy of

her husband, in others, her rights have been carefully guarded; thus, in Indiana she is given a right to a fee-simple in one-third of the lands of her husband, which right has been declared to be of the nature of dower, and to resemble it in its incidents and characteristics; see *Hendrix v. McBeth*, 61 Ind. 473, *Roberts v. Shroyer*, 68 Id. 64; *Mark v. Murphy*, 76 Id. 534; *Johnson v. Plume*, 77 Id. 166; and in California, where, by the Act of April 17, 1850, dower was abolished, a community of property was established between husband and wife, and the latter's rights therein were protected against a devise of the husband, *Beard v. Knox*, 5 Cal. 252.

Object and Prerequisites of Dower.

The object of the institution of dower, is said to be for the sustenance of the widow, and the nurture and education of the younger children of the deceased husband, Blackst. Com., Lib. II., p. 130; Co. Lit. 30 b; *Higgins v. Breen*, 9 Mo. 497. To render the right perfect, there must occur three things—marriage, seizin of the land in which dower is claimed during the coverture, and the death of the husband, Co. Lit. 31 a; *Sisk v. Smith*, 6 Ill. 503. It attaches, as a consequence, and by virtue of marriage, and for reasons of public policy connected therewith, *Matter of Central Park Extension*, 16 Abb. Pr. 36, and is not an estate created or raised by contract, *Higgins v. Breen*, 9 Mo. 497; *Lawrence v. Miller*, 1 Sandf. 516. As said by COULTER, J., in *Melizet's Appeal*, 17 Pa. St. 449: "It is not part of the marriage contract. It results from wedlock, by the operation of existing laws at the time of the husband's death."

The estate does not become absolute until the death of the husband, when it becomes so immediately, *Price v. Johnston*, 4 Yeates 526.

Dower Inchoate.

During the lifetime of the husband, dower is not an estate, but a mere inchoate, though valuable, right, *Sewall v. Lee*, 9 Mass. 363; *State v. Wincroft*, 76 N. C. 38; *Sutliff v. Forgey*, 1 Cow. 89, affirmed, 5 Id. 713; *Wheeler v. Kirtland*, 27 N. J. Eq. 534; *Reiff v. Horst*, 55 Md. 42; protected, indeed, against the acts of the husband, *McClurg v. Schwartz*, 6 W. N. C. 361, but, as it is not a constitutional right, *Melizet's Appeal*, *supra*, entirely at the mercy of the Legislature, by which it may be, while inchoate, entirely divested, *Moore v. City of New York*, 4 Sand. Sup. Ct. 456, affirmed, 8 N. Y. 110; *Lee v. Lindell*, 22 Mo. 202; *Noel v. Ewing*, 9 Ind. 37; *Lucas v. Sawyer*, 17 Iowa 517; *Barbour v. Barbour*, 46 Me. 9; *Magee v. Young*, 40 Miss. 164; *Weaver v. Gregg*, 6 Ohio St. 547.

In order to divest or modify dower, the legislative interest to accomplish that object must be apparent, and the wife's right will not be suffered to be destroyed by an act which can affect dower only through acting upon the husband; thus, in *Sewall v. Lee*, 9 Mass. 363, it was held that a wife would not be deprived of her dower by virtue of an act confiscating the land of her husband, or, as to lands acquired by the husband before its passage, by an act declaring that he should be held as an alien, if the husband were a citizen; for in each case, during the coverture, the husband was so seized as to vest the inchoate right in his wife; and in *Hinds v. Pugh*, 48 Miss. 268, the rule was laid down, that a statute cutting down dower must be strictly construed, and that the courts would sustain a claim for dower so far as was possible within the terms of such a statute.

Dower has been held to be an incumbrance, *Barnett v. Gaines*, 8 Ala. 373, within the range of a covenant against incumbrances, *Russ v. Perry*, 49 N. H. 527; *Shearer v. Ranger*, 22 Pick. 447; *Jones v. Gardner*, 10 Johns. 266; *Parks v. Brooks*, 16 Ala. 529; *Gazley v. Price*, 16 Johns. 268; but see *Powell v. Monson and Brimfield Manufacturing Co.*, 3 Mason 347; *Carter v. Denman*, 3 Zab. 260.

Who is Entitled to Dower.

Before proceeding to the examination of the subject of dower consummate, we will consider, briefly, who is entitled thereto. We have seen that marriage and death of the husband are necessary conditions of dower, therefore the widow alone is dowable, and, to make a widow, there must be a lawful marriage, *Higgins v. Breen*, 9 Mo. 497; *Donnelly v. Donnelly's Heirs*, 8 B. Mon. 113; and in a suit for dower, it may be shown in defence that the connection between the demandant and the deceased was not marriage but concubinage. In *Jones v. Jones, Admr.*, 28 Ark. 19, BENNETT, J., in delivering the opinion of the Court, said: "In a suit for dower, it is clear that an actual marriage, either under the forms prescribed by the statute, or, as prescribed by the common law, is necessary. It is not one of those cases in which a man is estopped, on grounds of public policy or private right, from denying that he is married to a woman. . . . Here the person claiming to be the wife, assuredly, has no higher equity than the relations of the deceased; for, if instead of being married she lived with the deceased as his concubine, it was her own fault, and she can blame herself alone."

As a lawful marriage cannot exist where there is any legal impediment, so, where a marriage is solemnized between a man and a woman, and the one has a husband, or the other a wife, living at the time, although

they continue to reside together as man and wife until the former's death, there can be no dower, *Smith v. Smith*, 5 Ohio St. 32; *Williamson v. Parisian*, 1 Johns. Ch. 389; *Fenton v. Reed*, 4 Johns. 52; *Smart v. Whaley*, 6 Sm. & M. 308; and that although the woman has been married in ignorance of the fact that the man had a wife living, *Donnelly v. Donnelly's Heirs*, 8 B. Mon. 113; in that case, however, it was held that the woman having acted innocently, and the relation having continued after the removal of the impediment to its lawfulness, by the death of the first wife, a new marriage, after her death, might be inferred.

A woman who goes through the form of marriage with a lunatic, or a person *non compos mentis*, can have no dower in his estate, for a lunatic is unable to contract a marriage, *Jenkins v. Jenkins's Heirs*, 2 Dana 102. In Rhode Island, this is enacted as the law by statute, Laws (1881), Tit. XX., Ch. 163, §5, p. 416.

At common law, the wife of an alien is not dowable, Co. Lit. 31 a; *Sewall v. Lee*, 9 Mass. 363; *Alsberry v. Hawkins*, 9 Dana 177; *Currin v. Finn*, 3 Denio 229; but where, by act of Legislature, an alien is allowed to purchase land, there his wife may have dower, for the right of dower is inseparable from the estate acquired by the husband, *Sutliff v. Forgey*, 1 Cow. 89; 5 Id. 713; and she may recover dower against one holding title derived from the husband, although the husband was not entitled to hold land, because of the rule of law which will not permit the alienee, in an action of dower, to deny the seizin of the husband, *Davis v. Darrow*, 12 Wend. 65.

In Missouri, it was held, before the enactment of any statute with special reference either to the dowable quality of an alien or the rights of an alien to acquire or hold real property, that under a general act, providing for the descent of the estate of any person in a particular way, saving "the widow's right of dower, if there be one," an alien's widow might be endowed; the Court, in delivering judgment, dwelt on the different policies of England and of this country on the subject of aliens, and was of opinion, that had the Legislature intended to have excluded the widow's dower, it would have said so, *Stokes v. O'Fallon*, 2 Mo. 29. The reasoning of the case seems, however, rather fallacious, and it is hard to see how, where the common law prevails, dower can be given to an alien in the absence of a statute for the purpose.

In *Sutliff v. Forgey*, *supra*, it was held that the alien wife of a native, or of a naturalized citizen, could not have dower; this position was denied by the Supreme Court of New York in *Priest v. Cummings*, 16 Wend. 617, but this case was reversed, in 20 Wend. 338, by the Court of Errors, which affirmed the doctrine of *Sutliff v. Forgey*, and held, further, that the subse-

quent naturalization of the wife would give her no right to dower in lands previously aliened by the husband.

The New York statute of 1825, with reference to aliens (see *post*, p. 518), covers the case of a widow's dower; and the alien widow, even of a person capable of taking land, must file her deposition, as required by said act, in order to be entitled to dower, *Curran v. Finn*, 3 Denio 229; *Connolly v. Smith*, 21 Wend. 59. By statute of April 30, 1845, it was enacted that an alien woman, "married, or who may be hereafter married, to a citizen of the United States, shall be entitled to dower." Under this act, it was held that where a marriage took place before the passage of the statute—at a time when both the husband and wife were aliens,—and the husband afterwards was naturalized, and the wife never came to this country, she could not have dower, *Greer v. Sankston*, 26 How. Pr. 471. The same conclusion was arrived at in *Burton v. Burton*, Id. 474, in which case the Court considered also the Act of Congress of Feb. 10, 1855, 10 U. S. Stats. at Large, p. 604, § 2, and held that it was intended for the benefit of an alien who married a person who, at the time of marriage, was a citizen, or, if liberally construed, one who came to the United States with an alien, who was afterwards naturalized, and so had identified herself and her interests with this country.

In *Sistare v. Sistare*, 2 Root 468, the wife of a naturalized foreigner, who remained away from her husband, through her own fault, in a foreign country, was held not dowable. This decision, however, was not necessarily upon the question of alienage, since, by the Connecticut law, dower is given only to a woman living with her husband at the time of his death or absent, by his consent or default, or divorce without alimony, where she is the innocent party.

In *Pratt v. Tefft*, 14 Mich. 191, a widow, non-resident in the State at the time of her husband's death, was held not entitled to dower in land which the husband had conveyed in his lifetime. The same rule prevails in Wisconsin, Rev. Stat., § 2160; *Bennett v. Haines*, 51 Wisc. 251. In general, however, it may be considered that residence in another State of the Union will not prevent the widow having her dower, *Jones v. Geroch*, 6 Jones Eq. 190. The presumption of alienage, which attaches to a wife from her removal with her husband to a foreign country, may be rebutted, *Moore v. Tisdale*, 5 B. Mon. 352.

Statutes conferring upon aliens the right to hold realty, cover the right to dower when claimed by an alien woman; for these statutes, see *post*, p. 515. In addition, in the following States aliens are expressly allowed dower by statute, Arkansas, Rev. Sts. CXLI., § 2211; Illinois, Rev. Stat., Ch. 41, § 2, p. 423; Iowa (except as against a purchaser from the husband); Anne

tated Stats. (1880, McClain), Tit. XVI., Ch. 4, § 2442; Michigan, Comp. Laws, Vol. 2, Tit. 22, Ch. CLI., § 4289 (see *Pratt v. Tefft*, *supra*); Nebraska, Comp. Stat., Pt. 1, Ch. 23, § 20; New Jersey, Rev. of 1877, p. 320, pl. 1; Oregon Stat., Ch. 17, Tit. 1, § 21; Wisconsin, Rev. Stat., Pt. 2, Tit. 20, Ch. 98, § 2160 (see *Bennett v. Haines*, 51 Wisc. 251).

In what Dower is given.

Dower, in both the technical and the popular use of the word, applies to realty only, *Dow v. Dow*, 36 Me. 211; *Perkins v. Little*, 1 Id. 148; *Brackett v. Leighton*, 7 Id. 383; and to realty in its technical sense—corporeal or incorporeal hereditaments. In Kentucky, following the English precedents, *Buckeridge v. Ingram*, 2 Ves., jr. 651; *Drybutter v. Bartholomew*, 2 P. Wms. 127, the Supreme Court held railroad shares realty and the wife dowable thereof, *Price v. Price's Heirs*, 6 Dana 107, and adhered to its position afterwards in *Copeland v. Copeland*, 7 Bush. 349. After the latter decision, however, the Legislature passed an act declaring railroad shares personalty, Act March 22, 1871. The question was also raised in Ohio in *Johns v. Johns*, 1 Ohio St. 350, but the Court held railroad shares personalty, and refused dower therein; *Welles v. Cowles*, 2 Conn. 567, wherein the Supreme Court of Connecticut had held turnpike shares realty, being brought to the attention of the Court, THURMAN, J., while disapproving of the decision, drew a distinction between turnpike and railway shares. In Massachusetts, turnpike shares have been decided to be personalty, *Tippets v. Walker*, 4 Mass. 595.

The New England Rule as to Wild Lands.

In some parts of the Union it has been held that dower is confined to cultivated or improved, or, at least, useful lands, and hence it has been refused in wild lands, *Kuhn v. Kaler*, 14 Me. 409; *Stevens v. Owen*, 25 Id. 94. In *White v. Outler*, 17 Pick. 248, SHAW, C. J., thus stated the reason for the rule: "Such estate yields no annual profit. The owner may make a profit of the land, but it is in the exercise of the right of the tenant in fee, which a tenant for life does not enjoy, that of felling trees;" and see *Webb v. Townsend*, 1 Pick. 21; *Conner v. Shepherd*, 15 Mass. 164. This which had become common law in New England has been confirmed by statute, New Hampshire, Gen. Stat. (1878), Ch. 20, § 3, p. 474; Massachusetts Stat. (1882), Pt. 2, Tit. 1, Ch. 124, § 4, p. 741.

The law in New England is, however, contrary to the law in the Union, generally, which is that dower may be had in wild lands, *Schnebly v.*

Schnebly, 26 Ill. 116; *In Re Campbell*, Appellant, 2 Dougl. 141; *Chapman v. Schroeder*, 10 Ga. 321; *Allen v. McCoy*, 8 Ohio 418; *Hickman v. Irvine's Heirs*, 3 Dana 121; *Brown v. Richards*, 17 N. J. Eq. 32.

Even where the New England rule prevails, there is no presumption that land is wild, *Lothrop v. Foster*, 51 Me. 367; and where the wild land is used in connection with other land which is cultivated or improved, or with a dwelling-house, for the purpose of supplying it with fuel, fencing, etc., dower may be had in the wild land, *Stevens v. Owen*, 25 Me. 94; *White v. Willis*, 7 Pick. 143; and it may be had in pasture lands, although separated by some distance and by intervening lots from the house in connection with which they are used, *Shattuck v. Gragg*, 23 Pick. 88; and this applies to pasture land, which since the alienation of the husband has become overgrown, *Id.* Where land is partly pasture and partly wild, dower will be given in the whole tract, *Mosher v. Mosher*, 15 Me. 371. The test in all cases would seem to be connection with improved land. In *Conner v. Shepherd*, 15 Mass. 164, PARKER, C. J., in announcing the Massachusetts rule said, after stating the English rule as to the character of property in which dower would be given and its exceptions: "The question whether forests, parks, and other property of a similar nature are also exceptions, seems never to have occurred, probably because there is no instance in Great Britain of any such property held separately and distinct from improved and cultivated estates."

It may be noted, however, that to establish a connection, it is not sufficient that the husband, in conveying a tract of woodland from the lot on which he lived, retained a right to take therefrom an abundant supply of fuel, etc., *Kuhn v. Kaler*, 14 Me. 409.

To take lands out of the category of wild lands, so that the widow may be dowerable of them, it is not necessary that they should be productive, but whenever they have been worked, and have not reverted to a state of nature, during the seizin of the husband, it is sufficient, *Johnson v. Perley*, 2 N. H. 56.

In Massachusetts, the statute above cited confines dower in wood or other wild lands to lots connected and used in connection with a farm or dwelling, and excludes it even in such lands where they have been cleared by the alienee of the husband.

Mines and Quarries.

Dower is given in mines and quarries opened and worked in the lifetime of the husband, *Lenfers v. Henke*, 73 Ill. 405; *Coates v. Cheever*, 1 Cow. 460; *Moore v. Rollins*, 45 Me. 493; *Billings v. Taylor*, 10 Pick. 460; *Hen-*

drix v. McBeth, 61 Ind. 473; or by the heir or owner of the fee before the assignment of dower, *Lenfers v. Henke*; a temporary opening and working will suffice to entitle the widow to dower, *Id.*; and her right extends to the whole quarry or mine, and is not confined to the portion actually opened and worked, *Moore v. Rollins*, *Billings v. Taylor*; this is the case even where the practice has been to open mines or quarries in sections, *Billings v. Taylor*; but of unopened mines, as *mines*, the widow can have no dower, *Coates v. Cheever*, *supra*.

Growing Crops.

A widow is entitled to dower in crops growing at the time of her husband's death, and is not barred thereof by their having been included in the inventory of her husband's personal estate, *Clark v. Battorf*, 1 Thomp. & Cook (N. Y. Sup'r Ct.) 58; but where they have been assigned by the husband to pay his debts, she cannot have dower therein, for by their constructive severance from the realty they have lost their real character, *Street v. Saunders*, 27 Ark. 554.

Accretions.

The widow of a riparian owner is dowable of accretions, whether they took place during the possession of the husband or of an alienee, *Lombard v. Kinzie*, 73 Ill. 446; *Gale v. Kinzie*, 80 Id. 132.

Mere Privilege.

There is no dower in a mere privilege, as one given by a deed from canal commissioners to use the surplus waters of a canal, *Kingman v. Sparrow*, 12 Barb. 201.

Estate to which Dower Attaches—Freehold of Inheritance.

The estate in which dower can be had must be an estate of freehold as well as of inheritance, *Weir v. Humphries*, 4 Ired. Eq. 264; *Apple v. Apple*, 1 Head 348; it may be had in an estate tail, *Amelia Smith's Appeal*, 23 Pa. St. 9; but the law is otherwise, by statute, in Kentucky, dower being there limited to lands held by the husband in fee-simple, Gen. Stat., Ch. 50, Art. IV., § 2, p. 527.

It cannot be had in an estate *pur autre vie*, *Fisher v. Grimes*, 1 S. & M., Ch. 107; *Gillis v. Brown*, 5 Cow. 388; or in a term of years, even if the term be a very long one, as in *Goodwin v. Goodwin*, 33 Conn. 314, where the

term was nine hundred and ninety years, and *Ware v. Washington*, 6 Sm. & M. 737, where it was ninety-nine years; and the case is not altered by the fact that the lease contains a clause making the term renewable forever, *Spangler v. Stanler*, 1 Md. Ch. 36.

In Massachusetts, however, an estate for one hundred years and over, so long as fifty years thereof remain unexpired, is declared, by statute, to be, for the purposes of dower, realty, and the widow will be endowed thereof subject to the obligation to pay her proportion of any rent which may be payable therefor, Pub. Stat. (1882), Pt. 2, Tit. 1, Ch. 121, §§ 1, 2, p. 738; and in Missouri, dower is given, by statute, in leaseholds, for twenty years or more, Rev. Stat., Vol. I., Ch. 29, § 2186, p. 363.

Estate subject to Condition, or determinable by Executory Devise.

Dower may be had in land held subject to a condition for repurchase, *Chase's Case*, 1 Bland. 206; or in a fee-simple, determinable by executory devise on the death of the husband, without issue living at the time of his death, *Evans v. Evans*, 9 Pa. St. 190; *Milledge v. Lamar*, 4 Desau. 617; *Buchanan v. Sheffer*, 2 Yeates 374; *Lovett v. Lovett*, 10 Phila. 537; *Kennedy v. Kennedy*, 29 N. J. Law 185. Against this latter position it has been objected, that as where the husband's estate is evicted by title paramount, the seizin is defeated *ab initio*, and as the wife's dower depends upon the husband's seizin, it should be excluded by such a devise. This question, which has puzzled some of the most profound minds in the law, is thus dealt with by Chief-Justice GIBSON in *Evans v. Evans*: "All agree that where the husband's fee is determined by recovery, condition, or *collateral* limitation, the wife's dower determines with it. But why a collateral limitation rather than by any other limitation of the estate which extinguishes the husband's fee, of which the dower is but appendage? I have a deferential respect for the opinions of Mr. Butler, who was, perhaps, the best conveyancer of his day; but I cannot apprehend the reason of his distinction in the note to Co. Lit. 241 a, between a fee limited to continue to a particular period at its creation, which curtesy or dower may survive, and the devise of a fee-simple, or a fee-tail, absolute or conditional, which, by subsequent words, is made determinable upon some particular event, at the happening of which curtesy or dower will also cease. In *Doe v. Hutton*, Lord ALVANLY spoke doubtingly of it; and, without absolutely dissenting from it, refused to give it his approbation. The system of estates at the common law is a complicated and an artificial one; but still it is a system complete in all its parts, and consistent with technical reason. But how to

reconcile to any system of reason, technical or natural, the existence of a derivative estate, after the extinction of that from which it was derived, was for him to show; and he has not done it. He drew his instances from statutory estates, whose limitations have been moulded more benignly; and though he affirms that a wife might have been endowed of an extinct conditional fee before the statute *de donis*, he gives no precedent for it. The case of a tenant in tail, says Mr. Preston in his Abstracts of Title, vol. 3, 372, 'is an exception arising from an equitable construction of the statute *de donis*; and the cases of dower of estates, determinable by executory devise and springing use, owe their existence to the circumstance that these limitations are not governed by common-law principles.' The mounting of a fee upon a fee, by executory devise, is proof of that. This very satisfactory solution of the doubt was glanced at, but not developed, in *Buckworth v. Thickell*.^{*} Before the statute of wills there was no executory devise, and before the statute of uses there was no springing use. Like estates tail, which were created by the statute *de donis*, and of which there is constantly dower, though tenant in tail claims *per formam doni*, it was the benign temper of the judges who moulded the limitations of the estates introduced by them, whether original or derivative, so as to relax the severer principles of the common law; and, among other things, to preserve curtesy and dower from being barred by determinations of the original estate, which could not be prevented. . . . It may be safely said that *Buckworth v. Thickell*, *Goodenough v. Goodenough*,[†] and *Moody v. King*,[‡] had a solid foundation in the interpretation of the statutes, which sustained the estate from which the curtesy or dower was derived. Lord ALVANLY is reported to have said, in *Doe v. Hutton*, 3 B. & P. 653, that *Buckworth v. Thickell* made a good deal of noise in the profession at the time it was decided—a remark which was properly disposed of by Chief-Justice BEST in *Moody v. King*: 'Whatever conveyancers may have thought of the case,' said he, 'when it was first decided, they have since considered it as having settled the law; and it would be productive of much confusion if we were to unsettle it again.' Including the decision then made, we have three cases in point without an antagonist case in all the books; and if to overturn them for the sake of a technical principle, would have bred much confusion then, it would breed more confusion now. The English courts have gone upon a liberal principle, and we are bound to follow them."

Where an estate is given upon a condition precedent and until the fulfil-

^{*} 10 Moore 285 n.; 3 B. & P. 652 n.; 4 Dougl. 323.

[†] 2 Dickens 1765; and see statement of the case in 3 Preston on Abstracts 372.

[‡] 10 Moore 233; 2 Bing. 447.

ment of that condition to another, the latter has such an estate of inheritance as will support dower, *Jackson v. Kip*, 3 Hals. 241.

Estate in Common.

Dower may be had in an estate held in common, *Holbrook v. Finney*, 4 Mass. 566; *Pyncheon v. Lester*, 6 Gray 314; *Harvill v. Holloway*, 24 Ark. 19; *Blossom v. Blossom*, 9 Allen 254; *Ross v. Wilson*, 58 Ga. 249; *Hill v. Gregory*, 56 Miss. 341; *Cook v. Walker*, 70 Me. 232.

Joint-Tenancy.

There is no dower of an estate in joint-tenancy, *Mayburry v. Brien*, 15 Pet. 21; *Cockrill v. Armstrong*, 31 Ark. 580; for the title of the joint-tenant by survivorship is prior to that of the wife by dower; as said by EVANS, J., in *Reed v. Kennedy*, 2 Strobb. 67: "The special reason given in all the cases why a widow shall not be endowed of a joint-tenancy, is that the surviving joint-tenant, being already seized of the whole, is in, by prior title, to that which the law casts upon her; and the same reason is given why the heir of the deceased tenant cannot take by inheritance."

Where, however, the *jus accrescendi* is abolished as between joint-tenants, there the widow may have dower, for *cessat ratione cessat ipsa et lex*, and the mere abolition of the right, without any express mention of the widow or of dower, is sufficient to bring about this result, *Reed v. Kennedy, supra*; *Davis v. Logan*, 9 Dana 185.

In Mississippi, before the estate in dower was abolished, a woman was, by statute, dowable of an estate in joint-tenancy, *James v. Rowan*, 6 S. & M. 393; and she may be endowed of such an estate in West Virginia, Rev. Stat., Vol. 2, Ch. 82, § 18, p. 556.

Partnership Lands.

The widow of a co-partner is not entitled to dower in partnership lands, as against the firm or its creditors, *Galbraith v. Gedge*, 16 B. Mon. 631; *Duhring v. Duhring*, 20 Mo. 174; *Greene v. Surviving Partners of Greene & Co.*, 1 Ohio 535; *Sumner v. Hampson*, 8 Id. 328; *Hiscock v. Jaycox*, 12 N. B. R. 507; *Simpson v. Leech*, 86 Ill. 286; but where real property is held by a firm, and has not otherwise had the character of personalty impressed upon it, the law in the United States will give a widow dower in her husband's proportion of the land after the partnership debts have been paid, *Hale v. Plummer*, 6 Ind. 121; *Loubat v. Nourse*, 5 Fla. 350; *Sykes v. Sykes*, 49 Miss. 190; *Goodburn v. Stevens*, 1 Md. Ch. 420; S. C. 5 Gill 1; and in *Campbell v. Campbell*, 30 N. J. Eq. 415.

The fact that the title to the property is taken in the name of one of the

partners instead of in the name of the firm, does not alter the law, *Bopp v. Fox*, 63 Ill. 540; *Nicoll v. Ogden*, 29 Ill. 323; and the law is the same where lands, purchased with partnership funds for partnership purposes, have been conveyed to the several individual members of the firm, as individuals, *Willet v. Brown*, 65 Mo. 138.

It is not, however, every purchase of land by partners, even with partnership funds, which will render the land liable to be dealt with as partnership property, *Ware v. Owens*, 42 Ala. 212; the purchase must be for partnership purposes, *Galbraith v. Gedge*, *supra*; and in lands purchased by partners, with no agreement that they shall be treated as joint stock, and where there is no application or use of the land, showing that the original understanding was that they should be so treated, the wife of a co-owner will be entitled to her dower, *Wooldridge v. Wilkins*, 3 How. (Miss.) 360; and in *Markham v. Merrett*, 7 Id. 437, where partners had extended their business to the purchase and sale of town lots, but had made conveyances not in the partnership style but in their individual names as tenants in common, it was held that the wife of a partner was entitled to dower.

The reason of the refusal of dower in partnership land, rests upon the agreement of the partners that it shall be liable to sale for the partnership debts. This agreement need not be expressed with reference to the lands, but may be inferred from the general agreement of partnership. See *Greene v. Surviving Partners of Greene & Co.*, 1 Ohio 535. This case is slightly alluded to by the Vice-Chancellor in *Smith v. Jackson*, 2 Edw. 28, but it seems to contain a full and clear statement of the law and to be well reasoned.

Where land was purchased for five persons, who signed an agreement that it should be held by one in trust, to receive the avails until a sale and conversion, it was decided that there was such an agreement as converted the land into personalty, and that the widow of one of the partners who died before sale could not have dower, *Coster v. Clarke*, 3 Edw. 428.

It has been held in the case of a planting partnership, that the widow should be endowed of her husband's share of the profits, *Sykes v. Sykes*, 49 Miss. 190.

What Title will Sustain Dower—Warrant Lands—Pre-emption Rights, etc.

The question sometimes arises as to what title, other than a legal and perfected one, will sustain dower.

In the early days of Pennsylvania, lands, in that State, held by warrant were not subject to dower. In *Dodson v. Davis*, 2 Yeates 168, one Dodson had settled on land without obtaining an office title; he sold the land in 1755, and

in 1776 obtained a warrant therefor. Dower being claimed in the land, the Court (McKEAN, C. J., and YEATES, J.) said: "Dower must be of a legal estate in the husband. The right which John Davis had to these lands in 1755 cannot be deemed such. Under the customs and established practice of the country, lands warranted, and even surveyed, were considered at that early period, and afterwards, as chattel interests, and sold as such in the course of administration. This doctrine has been established in a variety of cases, and particularly in *Duncan's Lessee v. Walker*, in January Term, 1793." But the same Court, in 1799, gave dower of lands held by improvement right alone, *Kelly v. Mahan*, 2 Yeates 515. That dower will not be given in land held by warrant, has also been held in the quite recent case of *Drennan v. Walker*, 21 Ark. 539; and see *Mulhollan v. Thompson et ux.*, 13 Ark. 232; but see *Blakeney v. Ferguson*, 20 Id. 547.

There is no dower in a mere pre-emption right under an act of Congress, *Davenport v. Farrar*, 1 Scam. 314; *Wells v. Moore*, 16 Mo. 479; *Bowers v. Keesecker*, 14 Iowa 301 (overruling *Davis v. O'Ferrall*, 4 Green (Iowa) 358); *Langworthy v. Heeb*, 46 Iowa 64; or in a mere right to receive a patent, *Chinnublee v. Nicks*, 3 Port. 362; *Woolley v. Magie*, 26 Ill. 526. There is, however, dower in lands held by certificate from the United States, the price having been paid, *Fleeson v. Nicholson*, Walker (Miss. Rep.) 247; and in military warrant lands, *Burke v. Barron*, 8 Iowa 132. In *Johnson v. Parcels*, 48 Mo. 549, a distinction was taken between such lands and lands held by pre-emption right, and it was decided that where a warrant was issued to a soldier under the Act of May 20, 1836, 5 U. S. Stat. at Large, p. 31, and a patent was issued in his name after his death, it would relate to the day of the soldier's enlistment, so as to give dower to the widow, if the husband died possessed of the land, though the claim of dower would not be enforced to the prejudice of innocent purchasers of the land.

Dower is given in a donation claim, the mere holding it being regarded as a sufficient seizin, *Ebey v. Ebey*, 1 Wash. Terr. 185; and in land claims under the Act of Congress of March 3, 1803, since, by that act, the heirs of the grantee took by descent, and, of course, subject to all the incidents of an estate by descent, *Hackler's Heirs v. Cabel*, Walker (Miss. Rep.) 91, and that although the patent did not issue until after the death of the claimant, *McKay v. Freeman*, 6 Oreg. 449.

Character of Estate—Dower in Equitable Estate.

At common law, formerly, in order to sustain dower it was necessary that the husband's estate should have been *legal*; see Tudor's Leading Cases in Real Property, note p. 71; *Crabbe v. Pratt*, 15 Ala. 843; *Mann v. Edson*, 39 Me. 25; and it was so held in Virginia prior to the act of

1785, which took effect in 1787, *Winn v. Elliott's Widow*, Hard. 402; *Clairborne v. Henderson*, 3 H. & M. 322; in Maryland prior to the act of 1818, *Hopkins v. Frey*, 2 Gill 369; and in Arkansas under the territorial statute, *Blakeney v. Ferguson*, 20 Ark. 553; *Kirby v. Vantrece*, 26 Id. 368; and the common law rule in this respect still prevails in Maine, *Hamlin v. Hamlin*, 19 Me. 141; and see *Mann v. Edson*, 39 Id. 25; and New Hampshire, *Hopkinson v. Dumas*, 42 N. H. 301. But where the legal and equitable estates merge during the coverture, the wife will be dowable. Thus in the case just cited, H. and others purchased land; the deed was made to H., in trust for himself and the others. Afterwards H. purchased the shares of his co-tenants, giving his notes for the price. The property was sold on a judgment obtained on one of the notes; it was held that his wife was entitled to dower.

The general rule, however, in this country, is that the widow may have dower in an equitable as well as a legal estate, *Shoemaker v. Walker*, 2 S. & R. 554; *Crabb v. Pratt*, 15 Ala. 843; *Lawson v. Morton*, 6 Dana 471; *Stevens v. Smith*, 4 J. J. M. 64; *Yeo v. Mercereau*, 3 Harr. (N. J.) 387; *Lewis v. James*, 8 Humph. 537; *Robinson v. Miller*, 1 B. Mon. 88; *Kirby v. Vantrece*, 26 Ark. 368; *Miller v. Wilson*, 15 Ohio 108; *Owen v. Robbins*, 19 Ill. 545.

Dower is given, by statute, in equitable estates in Ohio, Stat., Pt. 2, Tit. IV., Ch. 3, § 4188, p. 1049, where held by bond, articles, lease, or other evidence of claim; Illinois, Rev. Stat. (1880), Ch. 41, § 1, p. 425; Maryland, Tit. XXIV., Art. IV., § 1, p. 397; Alabama, Code (1876), Pt. 2, Tit. 3, Ch. 2, Art. 1, § 2232.

To render an equitable estate liable to dower, it must be perfect, the *cestui que trust* must be so declared by the instrument by which the estate is held or otherwise, or must be in such a position towards the land that a chancellor would compel a conveyance thereof to him, *Worsham v. Callison*, 49 Mo. 206; *Pugh v. Bell*, 2 T. B. Mon. 125; *Bailey v. Duncan's Rep.*, 4 Id. 256; *Reed v. Whitney*, 7 Gray 533; *Stow v. Steel*, 45 Ill. 328; *Owen v. Robbins*, 19 Id. 545; *Harrison v. Boyd*, 36 Ala. 203; *Boyd v. Harrison*, Id. 533; *Gillespie v. Somerville*, 3 St. & Port. 447; *Edmondson v. Montague*, 14 Ala. 370; *Smith v. Addleman*, 5 Blackf. 406; hence there will be no dower of lands which the husband held by a mere verbal contract, not enforceable under the statute of frauds, *Herron v. Williamson*, 6 Lit. 250; and see *Lane v. Courtney*, 1 Heisk. 331; or of which he was in possession by virtue of a contract of purchase, but without having held the legal title or having paid for the land, *Barnes v. Gay*, 7 Iowa 26; *Smith v. Addleman*, *supra*; *Lobdell v. Hayes*, 4 Allen 187; *Junk v. Cannon*, 34 Pa. St. 286; and this, although he had given his promissory note for the price, *Secrest v.*

McKenna, 6 Rich Eq. 72; or even if he had tendered the price, *Latham v. McLain*, 54 Ga. 320. As said by BLECKLEY, J., in delivering the opinion in the last cited case, "mere tender of money does not operate as payment, or work a transmutation of title. The money which the complainant's husband tendered to the railroad company remained his money, and if it was still on hand when he died, became assets of his estate; and if he owned the money at the time of his decease, he surely did not own the land also. The tender, together with the other facts, put him in a situation where he might have filed a bill for specific performance, and obliged the railroad company to invest him with title, but he did not pursue that course. . . . The most that can be said is, that he died possessed of a right to become seized of the land by proceedings in equity; and, possibly, if the right were now actually enforced by his executors, administrators, or heirs at law, so as to render the land the property of the estate fully and completely, the widow might be dowerable of it on the doctrine of relation." It is also held that if the husband, although he had not paid the price of the land, left the contract at the time of his death in such position that his heirs would be entitled to demand a conveyance on paying the purchase-money, the widow may have dower on doing equity, *Brewer v. Vanarsdale's Heirs*, 6 Dana 208; and see *Thompson v. Cochran*, 7 Humph. 72; *Stow v. Steel*, 45 Ill. 328, the last-named case being decided under the statute of Illinois last above cited, which expressly provides for dower in cases where "the title" may be completed after the husband's death; and see also Revised Stat. of Missouri, Vol. I., Ch. 29, §2187, p. 363.

It has been quite generally held that to sustain dower in an equity, the equity must subsist at the time of the husband's death, and hence, if transferred by him in his lifetime, the wife's right is gone, *Bowie v. Berry*, 1 Md. Ch. 452; *Hamilton v. Hughes*, 6 J. J., Mar. 581; *Gully v. Ray*, 18 B. Mon. 107; *Rands v. Kendall*, 15 Ohio 671; *Dougald v. Hepburn*, 5 Fla. 568; *Purdy v. Purdy*, 3 Md. Ch. 547; *Miller v. Wilson*, 15 Ohio 108; *St. Clair v. Morris*, 9 Id. 15; *Taylor v. Fowler*, 18 Id. 567; *Carter v. Walker*, 2 Ohio St. 339; *Carter v. Goodin*, 3 Id. 75; *Miller v. Stump*, 3 Gill 304; *Stow v. Steel*, 45 Ill. 328; *Lobdell v. Hays*, 4 Allen 187; *Hawley v. James*, 5 Paige 318; *Hicks v. Stebbins*, 3 Lans. 39; *Pritts v. Ritchey*, 29 Pa. St. 71; *Glenn v. Clark*, 53 Md. 580; but it is thought that the law, as thus stated, should be confined to imperfect equities and to equitable interests, and does not extend to perfected equitable estates in the stricter sense. In *Yeo v. Mercereau*, 3 Harr. (N. J.) 387, the law was held to be that where any one was seized to the use of the husband at any time during the coverture, if in equity the husband was the real owner and had a right to demand a conveyance, the right of dower would be enforced, although the equitable

estate passed from the husband during his life; and in *Atkin v. Merrell*, 39 Ill. 62, it was held that where a husband was seized of an equitable estate of inheritance, he could no more bar his wife's dower by a sale, or by procuring one to be made by the holder of the legal title, than if he himself held the legal title; see *Bank of Commerce v. Owens*, 31 Md. 320; *Swaine v. Perine*, 5 Johns. Ch. 482; but see also *Rands v. Kendall*, 15 Ohio 671; *Duval v. Febiger*, 1 Cincin. 268.

Dower in Equity of Redemption.

There may be dower in an equity of redemption as against all persons but the mortgagee and those who stand in his place, *Coles v. Coles*, 15 Johns. 319 (and see *Hitchcock v. Harrington*, 6 Johns. 290; *Collins v. Torrey*, 7 Id. 278); *Reed v. Morrison*, 12 S. & R. 18; *Snow v. Stevens*, 15 Mass. 278; *Carll v. Butman*, 7 Me. 102; *Manning v. Laboree*, 33 Id. 343; *Simonton v. Gray*, 34 Id. 50; *Thompson v. Thompson*, 1 Jones, Law 430; *Nottingham v. Calvert*, 1 Ind. 527; *Stoppelbem v. Shulte*, 1 Hill (S. C.) 200; *Hinchman v. Stiles*, 1 Stock. 361; *Rossiter v. Cossit*, 15 N. H. 38; *Cass v. Martin*, 6 Id. 25; *Robinson v. Bates*, 3 Metc. 40; *Hastings v. Stevens*, 29 N. H. 464; *Montgomery v. Bruere*, 2 South. 265, reversing S. C. 1 Id. 260; *Opdyke v. Bartles*, 3 Stock. 133; *Thompson v. Boyd*, 1 Zab. 58; *Campbell v. Knights*, 24 Me. 332; *Draper v. Baker*, 12 Cush. 288; *Van Duyne v. Thayer*, 14 Wend. 233; *Fish v. Fish*, 1 Conn. 559; *Titus v. Neilson*, 5 Johns. Ch. 452; *Bell v. Mayor of New York*, 10 Paige 49; *McMahan v. Kimball*, 3 Blackf. 1; *Rutherford v. Munce*, Walk. (Miss. Rep.) 370; *Denbon v. Murray*, 8 Barb. 618; *Hartshorne v. Hartshorne*, 1 Green Ch. 349. We use the term equity of redemption here as covering the estate left in the husband where a mortgage has been made prior to his marriage, or where the wife has joined in the mortgage, so that the legal estate was either not technically in the husband during the coverture, or had been surrendered with the wife's assent, or where, during the coverture, the husband, without his wife, has made a mortgage in a State where the joinder of the wife is not necessary to render it binding upon her, as in the case of Pennsylvania.

In *Bird v. Gardner*, 10 Mass. 864, however, the Court held that the right of dower in an equity of redemption existed only in equity, and that in view of the limited equity powers given to the courts in Massachusetts, there was no way of enforcing the right by adversary proceedings in that commonwealth; and in *Stelle v. Carroll*, 12 Pet. 201, the Supreme Court of the United States held that, as at the common law in England, there was no dower in an equity of redemption, and as that was the law of Maryland

at the time of the cession of the District of Columbia, there could be no dower in an equity of redemption in the district. That dower in an equity is enforceable only in equity, is also held in *McMahan v. Kimball*, 3 Blackf. 1.

Dower in an equity of redemption is given by statute in Maine, Rev. St. (1871), Tit. IX., Ch. 103, § 12, p. 758; Arkansas, Rev. St., Ch. XLIX., § 2213, p. 455; Michigan, Comp. Law, Vol. 2, Tit. XXII., Ch. CLI., § 4271, p. 1359; Wisconsin, Rev. St., Pt. 2, Tit. 20, Ch. 98, § 2162, p. 626; New York, Rev. St. (1882), Pt. 2, Ch. 1, Tit. 3, § 4, p. 2197; Nebraska, Comp. St., Ch. 23, § 3, p. 212; Oregon St., Ch. 17, Tit. 1, § 3, p. 584; Tennessee, St. (1871, T. & S.), Pt. 2, Tit. 3, Ch. 3, § 2399, p. 1075; Massachusetts, Gen. St. (1882), Pt. 2, Tit. 1, Ch. 124, § 5, p. 741; Vermont, St., Tit. 15, Ch. 114, § 2216, p. 450; Illinois, Rev. St., Ch. 41, § 3, p. 425.

Requisites of Equitable Dower.

To entitle the widow to an equitable dower, the husband must have been possessed of a vested equitable interest or estate, and that estate or interest must be inheritable, *Davenport v. Farrar*, 1 Scam. 314; there is no dower in a mere equity, *Farnum v. Loomis*, 2 Oreg. 29, or in a mere power to sell realty, though coupled with an interest in the proceeds thereof, *Germond v. Jones*, 2 Hill 569. Thus in *Porter v. Ewing*, 24 Ill. 617, P. and B. entered into an agreement, by the terms of which B. should furnish money, with which P. should carry on a trading business in land. It was also agreed that the title to land purchased should be taken in the name of B., and that P. should receive one-half of the profits resulting from the trade. P. bought land in accordance with the agreement, and sold the same: his wife claimed dower. It was held that she was not dowable, since her husband's right was only to the profits arising from the sale of the land, and he could have at no time demanded a conveyance of any part of the land to him, and that B. held the land in his own right until sale, and after that as a trustee for the purchaser.

Character of Seizin Necessary to Support Dower.

Having considered the nature of the estates, interests and equities in which dower may be had, it remains to consider the seizin necessary to support the estate; and here we may notice that, while seizin, or a right thereto, on the part of the husband is necessary, *Butler v. Cheatham*, 8 Bush. 594; *Mann v. Edson*, 39 Me. 25, a much more liberal rule of seizin is established in this country than at the old common law. As said by DUNCAN, J., in *Reed v. Morrison*, 12 S. & R. 18: "The truth is that the doctrine of seizin

is little known here, because it is inconsistent with the genius and spirit of our laws, which give a free scope to the alienation and transfer of property, untrammelled with the feudal doctrine of investiture and its concomitants, and with us seizin is for many substantial purposes, the beneficial interest and right of ownership." Accordingly, it is held that in claiming dower the widow need only give evidence which raises a fair presumption of seizin of the husband, which may be rebutted, *Becker v. Quigg*, 54 Ill. 390; and for the purpose of raising such presumption, proof of mere possession is sufficient, *Mann v. Edson*, *supra*; *Knight v. Mann*, 3 Fairf. 41; *Hale v. Munn*, 4 Gray 132; *McCullers v. Haines*, 39 Ga. 195; and will support dower as against all except those who claim by a title superior to that of the husband, *Torrence v. Carbry*, 27 Miss. 697. The reason for not requiring a strict deduction of title on the part of the widow is thus stated by EWING, C. J., in *Griggs v. Smith*, 7 Hals. 22: "The claim of dower is favored in the law. The widow is not entitled to the custody of the muniments of title; they belong to, and therefore are presumed to be held by, the husband in his lifetime, and after his decease by his heirs, or, in case of alienation, by the alienee. Hence, a strict deduction of title is not required of her. It is enough for her to produce such evidence as will raise a fair presumption of the seizin of the husband; and such presumption, unless overcome by the proof produced by the defendant, will support her claim." In this case, a deed from the person in possession immediately before the husband to him, and evidence of the latter's possession, were held sufficient to show seizin. Where two persons bought land and divided it, taking separate possession, and one, A., sold his lot, the other, B., joining with him in the deed, it was held that while this deed raised a *prima facie* case of tenancy in common, yet the sole possession of A. was sufficient evidence of sole seizin to give his wife dower of the whole of his lot, *Dolf v. Basset*, 15 Johns. 21; and where the husband, having a deed for certain land, entered on certain other land by mistake, and afterwards sold, and the purchaser took a quit-claim deed from the vendor of the husband, it was held that the wife could have her dower, as against the purchaser, based on the husband's possession, *Hale v. Munn*, 4 Gray 132; and in *Cochrane v. Libby*, 18 Me. 39, where land was levied on as belonging to A., who subsequently died, it was held that, as against a tenant who claimed title only under the levy, there was sufficient evidence of seizin to give dower to A.'s widow.

Seizin in Law Sufficient.

Seizin need not be in deed; seizin in law is sufficient, Co. Lit. 31 a; Doct. & Student Dial. II., Ch. 15; *Atwood v. Atwood*, 22 Pick. 283; *Gal-*

braith v. Green, 13 S. & R. 85; and see Kentucky, Gen. St., Ch. 52, Art. IV., § 4, p. 529; Missouri, Rev. St., Vol. I., Ch. 29, § 2207, p. 367; but where a deed was delivered to the husband, and was not registered by him, as required by law, and, so far as appears by the report of the case, there was no other evidence of seizin besides the deed, it was held that there was shown no such seizin as would entitle the widow to dower, *Thomas v. Thomas*, 10 Ired. Law 123; at all events, as against an innocent purchaser, *Emerson v. Harries*, 6 Metc. 475.

Grantee of Husband cannot Deny the Seizin of his Grantor, but may Show the Character of the Seizin.

The grantee of the husband is estopped upon familiar principles from denying the seizin of his grantor, *Davis v. Logan*, 9 Dana 185; but not from showing the character of the seizin, and that it was such as would not entitle the widow to dower, *Foster v. Dwinel*, 49 Me. 44; *Gammon v. Freeman*, 31 Id. 243; *Moore v. Esty*, 5 N. H. 479; *Edmondson v. Welsh*, 27 Ala. 578; *Otis v. Parshley*, 10 N. H. 403; *Sparrow v. Kingman*, 1 Comst. 242 (overruling as to the character of the estoppel, *Sherwood v. Vandenburg*, 2 Hill (N. Y.) 303; *Bowne v. Potter*, 17 Wend. 164; *Davis v. Darrow*, 12 Id. 65; *Hitchcock v. Harrington*, 6 Johns. 290; *Collins v. Torrey*, 7 Id. 278); *Crittenden v. Johnson*, 11 Ark. 94; *Farnum v. Loomis*, 2 Oreg. 29.

Seizin must be of Present Estate in Possession—Dos de dote peti non debet—Remainders.

The seizin which will give dower must be of a present estate of freehold in possession, and, therefore, where the husband is seized of a vested remainder, dependent upon a previous freehold, and the particular estate is not determined in the lifetime of the husband, his widow can have no dower in the remainder, *Dunham v. Osborn*, 1 Paige 634; *Otis v. Paishley*, 10 N. H. 403; *Northcutt v. Whipp*, 12 B. Mon. 65; *Durando v. Durando*, 23 N. Y. 331; *Arnold's Heirs v. Arnold's Admrs.*, 8 B. Mon. 202; *Fisk v. Eastman*, 5 N. H. 240; *Eldridge v. Forestal*, 7 Mass. 253; *Brooks v. Everett*, 13 Allen 457; *Green v. Putnam*, 1 Barb. 500; *Cocker's Exrs. v. Philips*, 12 Leigh 248; *Blow v. Maynard*, 2 Id. 29; *Reynolds v. Reynolds*, 5 Paige 161; *Royster v. Royster*, Phil. (N. C.) Law 226; *Gardner v. Green*, 5 R. I. 104; *Wilmarth v. Bridges*, 113 Mass. 407; *Vanleer v. Vanleer*, 3 Tenn., Ch. 23; *Butler v. Cheatham*, 8 Bush. 594. Hence arises the rule *dos de dote peti non debet*; in other words, that where one has died seized of lands which descend to the heir subject to the dower of the widow of the dece-

dent, and the heir has died before the widow, *his* widow will take dower in two-thirds only of her husband's lands so derived, *Reynolds v. Reynolds*, *supra*; *Safford v. Safford*, 7 Paige 259; *Reitzel v. Kard*, 65 N. C. 673; *Peckham v. Hadmen*, 8 R. I. 160.

In *Bear v. Snyder*, 11 Wend. 592, the Supreme Court of New York considered the existence of a previously assigned dower a temporary bar only, and held that on the death of the first widow, the second would have dower of her dower lands. SAVAGE, C. J., said: "But it is objected that this suit seeks to recover dower upon dower. This cannot be done; a widow is not dowerable of lands assigned to another woman in dower, Cruise, Ch. 3, § 20; but this proves only that the plaintiff is not entitled to dower in the one-ninth assigned to Mary Hall [the widow of the father-in-law] during her life. But she is entitled now to be endowed of the remaining eight-ninths; and, if she survives Mary Hall, she will be entitled to one-third of the ninth part." This case has been unfavorably criticised; see *Reitzel v. Kard*, 65 N. C. 673, and is not authority in its own State. In the *Matter of Cregier*, 1 Barb. Ch. 598, WALWORTH, Ch., in deciding that where the husband takes land by descent from his father, subject to the dower of his mother, which is afterwards assigned to her, the assignment will relate so as to bar the widow of the husband, dying in the life of his mother, from dower, even in the reversion of the estate, assigned for the previous dower, said, after quoting *Bear v. Snyder*: "It is evident, however, that the chief-justice had overlooked the distinction which exists between an estate which comes to the husband or wife subject to the mere contingent right of dower of the wife of the grantor, in case she survives him, and an estate by descent, which the heir-at-law takes subject to the present right of dower. In the first case, by act of the parties, the grantee of the land became seized of a present estate in the whole premises, subject only to a contingent right of dower in one-third thereof; so that upon the death of such grantee during the life of the widow of the grantor, the husband or wife of such grantee is entitled to an estate by the curtesy or dower in the whole premises, subject only to the incumbrance of the prior right of dower in one-third of that estate during the actual continuance of the prior right of dower in one-third of that estate during the actual continuance of that right. But in the other case, the assignment of dower to the widow of the ancestor relates back to the time of his death, so as to prevent the seizin of the heir-at-law of a present estate in the one-third of the premises assigned to the widow during her life." In support of his position, the learned chancellor cited Co. Lit. 31 a, as follows:

"And yet of every seizin in law, or actual seizin of lands or tenements, a woman shall not be endowed. For example, if there be grandfather,

father, and son, and the grandfather is seized of three acres of land in fee, and taketh wife and dieth, this land descendeth to the father, who dieth either before or after entry. Now is the wife of the father dowable. The father dieth, and the wife of the grandfather is endowed of one acre, and dieth. The wife of the father shall be endowed only of the two acres residue; for the dower of the grandmother is paramount the title of the wife of the father, and the seizin of the father, which descended to him (be it in law or actual) is defeated; and now upon the matter, the father had but a reversion expectant upon a freehold, and in that case *Dos de dote peti non debet*; although the wife of the grandfather die, living the father's wife. And here note a diversity between a descent and a purchase, for in the case aforesaid, if the grandfather had infeoffed the father, or made a gift in tail unto him, there, in the case above said, the wife of the father, after the decease of the grandfather's wife, should have been endowed of that part assigned to the grandmother; and the reason of this diversity is for that the seizin, that descended after the decease of the grandfather to the father, is avoided by the endowment of the grandmother, whose title was consummate by the death of the grandfather; but in case of the purchase or gift, that took effect in the life of the grandfather (before the title of dower of the grandmother was consummate), is not defeated, but only *quoad* the grandmother; and in that case there shall be *dos de dote*."

In *Durando v. Durando*, 23 N. Y. 331, the Court of Appeals concurred in the result reached in *Cregier's case*, but held that the rule should embrace cases wherein the title of the husband was by devise as well as those wherein it was by descent; and, after quoting the above passage of Coke, SELDEN, J., said: "This word purchase, which occurs in this paragraph, when used in contradistinction to descent, includes the obtaining of title by devise as well as by deed. But the whole reasoning of the passage cited, shows that the effect attributed to a purchase, follows only when the land is conveyed by deed; the sole reason given for the distinction is that a purchase takes effect in the lifetime of the vendee, and the purchaser becomes at once seized of a defeasible estate; while in case of a descent, the heir is never seized of the land assigned for dower during the life of the widow, as her title relates back in all cases to the death of her husband." The rule of *dos de dote peti non debet* applies only where there has been an assignment to the first widow, or where she is in actual possession of the land, *McLeery v. McLeery*, 65 Me. 172.

An estate by the curtesy, existing in the father of the husband, will, unless determined in the latter's lifetime, prevent dower, *Leach v. Leach*, 28 N. Y. S. C. 381.

In *Moore v. Esty*, 5 N. H. 479, A. conveyed to B., and B., at the same

time, reconveyed to A. for life, with the proviso that A. should not take possession so long as B. performed certain conditions; it was held that, although a security, A.'s estate was a life estate, which would debar B.'s widow from dower, and that by virtue of the rule of instantaneous seizin (*vide infra*, p. 325) no such estate had vested in B. as would sustain dower.

When the remainder is aliened during the coverture, the widow can have no dower, *Shoemaker v. Walker*, 2 S. & R. 554.

In Ohio, the law as to dower in a remainder is different from that above stated, since in that State dower is given, by statute, in a remainder or a reversion in fee, with the provision that the dower shall not be assigned until after the determination of the particular estate, *Laws*, Pt. 2, Tit. IV., Ch. 3, § 4188, p. 1049.

An outstanding lease for years, which has not expired at the time of the husband's death, will not deprive the widow of dower, for a mere chattel interest will not prevent the vesting of a fee in possession, *Sykes v. Sykes*, 49 Miss. 190; *Boyd v. Hunter*, 44 Ala. 705; and if a rent be reserved upon the lease, the widow, on endowment, will be entitled to her proportionate share thereof, *Boyd v. Hunter*, *supra*; *Williams v. Cox*, 3 Edw. 178.

Seizin must be Beneficial—No Dower in Wife of Trustee.

The seizin of the husband must be a beneficial one, and, therefore, of lands held by him in trust for another, his wife cannot have dower, *Robinson v. Cadman*, 1 Sumn. 121; *Derush v. Brown*, 8 Ohio 412; *Cowman v. Hall*, 3 G. & J. 398; *Thompson v. Murray*, 2 Hill Ch. 204; *Ocean Beach Association v. Brinkley*, 34 N. J. Eq. 438; *Bartlett v. Gouge*, 5 B. Mon. 152; *Hopkinson v. Dumas*, 42 N. H. 296; *Coster v. Lorillard*, 14 Wend. 314; and the fact that the widow had no knowledge of the trust at the time of the marriage, will not change the case; she is not in the position of a purchaser without notice, *White v. Drew*, 42 Mo. 561; and the bare legal title, where the husband is bound to convey to a vendee, will not sustain dower, *Aaron v. Bayne*, 28 Ga. 107; *Dean's Heir v. Mitchell's Heirs*, 4 J. J. Mar. 451; *Stevens v. Smith*, Id. 64.

There will, accordingly, be no dower in lands affected with a resulting trust in favor of another person, *Powell v. Monson and Brimfield Manufacturing Co.*, 3 Mason 347; thus, where a guardian purchased land with the money of his ward, it was held that dower did not attach in favor of the guardian's widow, *Gannaway v. Tarpley*, 1 Cold. 572.

In Michigan, where resulting trusts have been abolished, it is held that where title was taken by one, the principal part of the purchase-money being paid by others, the grantee agreeing to make deeds to them when so

required, the widow of the holder of the legal title could have dower in the whole tract, irrespective of the amount of the purchase-money paid by others than her husband, *Newton v. Sly*, 15 Mich. 391.

In New Jersey, it is enacted that the widow of a trustee shall have no dower in the trust estate, and the trustee is empowered to convey the land free of dower, Rev. of 1877, p. 324, pl. 25.

Trust Conjoined with Interest.

Where a trust is joined with an interest in the trustee, the wife may have dower, *Robinson v. Codman*, 1 Sumn. 121; *Cockrill v. Armstrong*, 31 Ark. 580.

A mere seizin as executor will not sustain dower, although the executor is one of the devisees of the testator, *Cockrill v. Armstrong*, 31 Ark. 580.

Instances of Beneficial Seizin.

In *Tewis v. Steele*, 4 T. B. Mon. 339, L. and S. were partners in an involved firm. S. agreed to assume L.'s indebtedness, and, in consideration thereof, L. conveyed to S. a house, which S. undertook to convey to a trustee, to secure the demands against the partnership and against S. personally. The conveyance was made; the property was sold for the benefit of creditors. The Court held that, inasmuch as the conveyance to S. was in part to secure his own debts as well as those of L., there was such a beneficial seizin as would entitle the widow of S. to dower.

In *Prescott v. Walker*, 16 N. H. 340, A. bought land in pursuance of an agreement with J., that he would convey to him, on J.'s making certain payments, including the price of the land and other debts. One P. paid A., and received from him the land, subject to the same terms with reference to J. It was held that A. had such a beneficial seizin as would entitle his widow to dower.

In *Bowen v. Collins*, 15 Ga. 100, where the vendor, holding a bond for the purchase-money of certain land, after the death of the vendee, took out letters of administration upon his estate, and sold the land as administrator, it was held that there was no such seizin as would support dower in the vendee's wife, and that the conduct of the vendor, as administrator, did not amount to such an admission as would estop him from denying such seizin.

Seizin of Heir, where Lands are Assets for Debts.

In States where lands are assets in the hands of the executor or administrator for the payment of the decedent's debts, the heir has no seizin

while they so remain ; and if he die before the payment of the outstanding debts, it has been held that his wife can have no dower, *Tate v. Jay*, 31 Ark. 576.

Title of Mortgagee.

A title as mortgagee is not sufficient to sustain dower where the title is not made absolute in the lifetime of the husband, *Flack v. Longmate*, 8 Beav. 420. See New York, Rev. St. (1882), Pt. 2, Ch. 1, Tit. III., § 7, p. 2197 ; Arkansas, Rev. St., Ch. XLIX., § 2216.

The wife of a mortgagee, after the land has become forfeited, may recover dower therein at law, *Weir v. Humphries*, 4 Ired. Eq. 264 ; but where a mortgagee entered for a foreclosure, and, instead of perfecting his title, conveyed the land, by quit-claim, to a third person, it was held that mortgagee's wife was not entitled to dower, *Foster v. Dwinel*, 49 Me. 44.

A conveyance absolute upon its face, cannot be so changed by parole as to destroy dower, *Atwood v. Atwood*, 22 Pick. 283.

Incomplete Title.

It sometimes happens that the land in which dower is claimed is held by a title, which is incomplete and imperfect, either for want of some compliance with a legal form or requirement, or for want of the performance of an act by the husband or by some third person, and the question then arises whether there is sufficient seizin to give dower.

In *Kluttz v. Kluttz*, 5 Jones Eq. 80, a husband bought land at a master's sale, and gave bond for the payment of the purchase-money, and died, it was argued that the seizin was incomplete for the purposes of dower, because the sale was liable to be set aside by the Court before confirmation ; but the Court held otherwise, and decided that the widow was entitled to dower, and that the purchase-money would have to be paid out of the personal estate, saying : "The power to set aside is not an arbitrary one, but is regulated by law. . . . It only adds a condition whereby the vendee's equity may be defeated. It makes the vendee's equity a little more complex, but does not materially change its nature."

In *Sutton v. Jervis*, 31 Ind. 268, A. made a deed to B., which deed was never recorded, but was lost, destroyed, or misplaced. B. entered on the land, and afterwards, by his consent, A. made a deed for the same to B.'s son, it was held that there was sufficient seizin in B. to give his widow dower as against a mortgage made by B. and his son, she not having joined therein.

In *Pickett v. Lyles*, 5 So. Car. 275, it was held, generally, that the failure of a husband to record a deed, whereby his title became invalid as against a subsequent purchaser, would not so far defeat his seizin as to deprive his widow of dower; and in *Tyson v. Harrington*, 6 Ired. Eq. 329, that the widow of one to whom a deed had been delivered, but from whom, before it was recorded, it had been stolen, could in equity have her dower; but where a husband received a deed, and suffered it to become void, as against subsequent purchasers, for want of recording, and, never having paid for the land, returned the deed in order to discharge his obligation to pay, his widow was refused dower, *Talbott v. Armstrong*, 14 Ind. 254.

Where title depends upon the act of some third person, *e. g.*, in the case of the conveyance of Indian lands, on the approval of the President of the United States, the title dates from the performance of the act, so far as relates to giving rise to the inchoate right of dower, *Parks v. Brooks*, 16 Ala. 529; *Shields v. Lyon*, Minor 278.

Where a contract is made for land, and time is given for payment, and the price is not entirely paid at the time of the husband's death, there is no dower, unless the personal estate of the decedent is sufficient to pay the balance, *Kintner v. McRae*, 2 Ind. 453; *Greenbaum v. Austrian*, 70 Ill. 591; or unless the contract is subsequently carried out for the benefit of the heirs, *Stow v. Steel*, 45 Ill. 328; but in Missouri, possession by a vendee, either by a legal title, coupled with the payment of the greater part of the purchase-money, or under a contract to purchase, will give dower, subject to the vendor's lien, *Hart v. Logan*, 49 Mo. 47; *Duke v. Brandt*, 51 Mo. 221.

Where a creditor made a levy, and, within the time allowed by law to the debtor to redeem the land, made a deed of quit-claim to a third person, the creditor's widow was held not dowable, *Foster v. Gordon*, 49 Me. 54.

Title not formally Divested until after Marriage.

Where, before marriage, the husband had conveyed land, but the deed was not recorded until afterwards, it was held that the husband was not so seized during the coverture as to give dower to his widow, *Blood v. Blood*, 23 Pick. 80. In this case it was argued that the unrecorded deed was good only against the grantor and his heirs, and the widow being neither, her rights could not be affected by it. But the Court said, that being good against the grantor and his heirs, the husband's seizin was thereby defeated, and there remained nothing upon which to rest dower; and see *Richardson v. Skolfield*, 45 Me. 386.

And even where the husband being an infant, before marriage, has made a

sale by parole, and after marriage, being of full age, makes a formal conveyance, it is so held, for the sale was only voidable, and not having been actually avoided, there was no beneficial seizin during coverture, *Oldham v. Sale*, 1 B. Mon. 76; *Gully v. Ray*, 18 Id. 107; and where the husband, prior to marriage, had sold land, and given a bond to convey the same, it was held that his wife could not have dower, *Dean's Heir v. Mitchell's Heirs*, 4 J. J. M. 451; but in *Madigan v. Walsh*, 22 Wisc. 501, where, before marriage, there was an oral agreement for a sale, unaccompanied by any part performance, it was held that the wife's rights were in nowise affected either by the contract or a subsequent performance of it, and that she might maintain a suit to have a deed executed and delivered in pursuance of the contract set aside as void.

It is also held that where, before marriage, a levy in execution has been made upon the husband's land, and a sale is made thereunder, after the marriage, the divestiture of seizin will relate, and the widow of the debtor can have no dower, *Brown v. Williams*, 31 Me. 403; but the mere levy, unless followed by actual sale on execution, will not have the effect of divesting the wife's dower, even if the land is sold for the purpose of paying the debt for which the levy was made. Thus in *Mayo v. Hamlin*, 73 Me. 182, a levy was made upon a man's property. After the levy he married. Within the year allowed for redemption, the creditor indefinitely extended the time for redemption. A conveyance of the land was made to a third person, who paid the husband's debt and took a release to himself from the creditor. It was held that the debtor's wife could have dower.

Conveyance in Fraud of Creditors before Marriage.

Where lands have been conveyed by the husband before marriage, in fraud of creditors, but with no intent to defraud the intended wife, there is a difference of opinion as to whether such a seizin is in the husband, on the setting aside the fraudulent conveyance, as will support dower. That it will, was held in *Swaine v. Perine*, 5 Johns. Ch. 482; but see contra, *Whithead v. Mallory*, 4 Cush. 138; *King v. King*, 61 Ala. 479; *Gross v. Lange*, 70 Mo. 45.

Mortgage before Marriage.

Where a mortgage is made before marriage, the wife can have no dower in the land mortgaged unless the incumbrance is discharged during the coverture, *Heth v. Cocke*, 1 Rand. 344; but she will have dower in the equity of redemption, *supra*.

Duration of Seizin Necessary to Support Dower.

A very interesting question has been mooted with reference to the duration of seizin necessary to give dower, and it has been maintained that seizin "but for an instant" will not be sufficient to vest dower. An examination will, however, show that the true principle of the cases which have seemed to sustain the position above mentioned, is that dower will not be given when, by the same transaction, the premises are vested in the husband and taken out of him—where he is the mere conduit-pipe of the title.

It is true, Coke, Co. Lit. 31 b, says, "Also of seizin for an instant a woman shall not be endowed." But even in England, the rule is by no means so general as thus stated; for it is said by Blackstone, that if the land abides in the husband for a single moment, the wife shall have dower, 2 Blackst. Com. 132; and see Cro. Eliz. 503, *Broughton v. Randall*, the famous case of the father and son being hanged from one cart, and where the son's legs having been seen to quiver after the death of the father, the Court held that there was sufficient seizin in the son to give his widow dower in lands descended from the father.

Mr. Justice Coleridge, in his note to Blackstone, *supra*, says: "In fact, the space of time is no essential ingredient in the case; it is the interest of the husband." In this country, it has been held that if the lands vest in the husband, beneficially, though but for an instant, the right of dower attaches, *Stanwood v. Dunning*, 14 Me. 290; *Edmondson v. Welsh*, 27 Ala. 578; *McCauley v. Grimes*, 2 G. & J. 318; *McClure v. Harris*, 12 B. Mon. 261; *Tevis v. Steele*, 4 T. B. M. 339; *Fontaine v. Boatmen's Saving Ins.*, 57 Mo. 552; and this as against strangers, and against all claiming under the husband, even if his seizin were tortious, *Randolph v. Doss*, 3 How. (Miss.) 205; at the same time, the cases hold that where one receives title merely to transfer it to another, no dower will arise from such seizin, *Bartlett v. Gouge*, 5 B. Mon. 152; *Wooldridge v. Wilkins*, 3 How. (Miss.) 360; the character as well as the duration of the seizin is to be looked to, *Douglass v. Dickson*, 11 Rich. Law 417.

Some cases, however, in most, if not all, of which the result arrived at can be sustained upon other grounds, have put the deprivation of the widow of her dower on the ground of instantaneous seizin; see *Stow v. Tift*, 15 Johns. 458; *Cunningham v. Knight*, 1 Barb. 399; *Bullard v. Bowers*, 10 N. H. 500. *Bullard v. Bowers* is sustainable on the ground that the question was between a dowress and a mortgagee in a purchase-money mortgage, and the authority of the New York cases is much weakened by the strong dissent of THOMPSON, C. J., in *Stow v. Tift*, and by the case of *Mills v. Van Voorhies*, 20 N. Y. 412, in which SELDEN, J., considered *Stow v. Tift*

as having no foundation in principle, but merely as deciding that the widow's rights were not paramount to those of the mortgagee.

The case of *Adams v. Hill*, 29 N. H. 202, was, however, not a case of a purchase-money mortgage, and the rule of instantaneous seizin was followed. In that case the facts were as follows: P. conveyed to A. lands in Lancaster for the price of \$2200; a week later A. conveyed the same lands to W., and received from W. a conveyance of land in Greenland, which A. at once mortgaged to P. to secure the \$2200. GILCHRIST, C. J., after citing Co. Lit. 31 b, and *Amcotts v. Catherich*, Cro. Jac. 615, said: "In the present case the mortgage was not made to secure the purchase-money of the Greenland lands, but of the lands in Lancaster; still, the two deeds would seem to constitute but one transaction; the estate passes out of him at the same instant that he receives it, *Stow v. Tiff*, 15 Johns. 458. The husband is not beneficially seized so as to entitle his wife to dower as against the mortgagee, and Kent says this conclusion is agreeable to the manifest justice of the case. There certainly is as much justice in holding that she is not so entitled against the mortgagee, though the mortgage was not given to secure the purchase-money of that particular estate. If there be only an instantaneous seizin where the mortgage is given to secure the purchase-money of the mortgaged land, the seizin is equally instantaneous here, for it can make no difference what particular debt the mortgage secures."

Possibly the most reasonable statement of the law upon this subject is that of ARCHER, J., in *McCauley v. Grimes*, 2 G. & J. 318: "Perhaps there is no general rule that in cases of instantaneous seizin the widow shall or shall not be entitled to dower. This must depend as well upon the character of the seizin as its duration. When a man has the seizin of an estate though for an instant, beneficially, for his own use, his widow shall be endowed; when the husband is a mere instrument for passing the estate, although there may be an instantaneous seizin, the widow shall not be endowed."

Purchase-Money Mortgage.

Where a man purchases land, and at the same time, or as a part of the same transaction, gives a mortgage for the purchase-money, the widow of the purchaser will not be entitled to dower as against the purchase-money mortgagee. This rule has sometimes been held to be the result of the doctrine of instantaneous seizin, but a much better foundation for it is in the superior equity of the mortgagee, *Eslava v. Lepretre*, 21 Ala. 504; *Boynton v. Sawyer*, 35 Id. 497; *Bogie v. Rutledge*, 1 Bay 312; *Trustees of Frazier v. Centre*, 1 McCord Ch. 279; *McCauley v. Grimes*, *supra*; *Nottingham v. Cal-*

vert, 1 Ind. 527; *Birnie v. Maris*, 29 Ark. 591; *Thomas v. Hanson*, 44 Iowa 651; *Hinds v. Ballou*, 44 N. H. 619; *George v. Cooper*, 15 W. Va. 666; *Crecelius v. Horst*, 4 Mo. App. 419; *Griggs v. Smith*, 7 Hals. 22; *Crafts v. Crafts*, 2 McCord 54; *Seekright v. Moore*, 4 Leigh 30; *Welch v. Buckins*, 9 Ohio St. 331; *Rands v. Kendall*, 15 Ohio 671; *Greene v. Greene*, 1 Id. 535; and see *Brown v. Duncan*, 4 McCord 346.

In Georgia, where the code (1867, §§1753, 1759) and the revision of 1873 (Pt. 2, Tit. 2, Ch. 1, Art. 2, §1769) provided that no lien, though assented to the wife, which was placed upon the property by the husband, should affect the wife's dower, it was held in *Slaughter v. Culpepper*, 44 Ga. 319, that a purchase-money mortgage would not take precedence of dower. McCAY, J., in delivering the opinion of the Court, saying: "But section 1759 of the code provides that *no lien* created by the husband shall in any manner interfere with the dower. Was this mortgage lien created by the husband? Without doubt it was. How then can we give it in any manner preference to the dower? What right have we to add an exception to the statute, especially when it contains such positive language? How can we give it a preference?"

After this decision, the law of Georgia was changed by the Act of February 24, 1875, §1, Laws, 1875, p. 100, which enacted that when a purchase-money mortgage was given, the widow should have no dower until the purchase-money was paid.

It is expressly provided by statute that there shall be no dower as against a purchase-money mortgage in Illinois, Rev. St., Ch. 41, §4, p. 425; Arkansas, Rev. St., Ch. XLIX., §2214; Michigan, Comp. Laws, Vol. 2, Tit. XXII., Ch. CLI., §4269, p. 1359; Wisconsin, Rev. St., Pt. 2, Tit. 20, Ch. 98, §2163, p. 626; Nebraska, Comp. St., Ch. 23, §4, p. 212; New York, Rev. St. (1882), Pt. 2, Ch. 1, Tit. 3, §3, p. 2197; Oregon, Laws, Ch. 17, Tit. 1, §2; North Carolina, Battle's Rev., Ch. 117, §4, p. 839; and see West Virginia, R. S., Vol. 1, Ch. 70, §3, p. 499, and Virginia, Code, Tit. 31, Ch. 106, §3, p. 853.

The conveyance and mortgage, in order to fall within the rule, need not be of the same date, or executed at the same time; it is sufficient if they are delivered at the same time, *Fontaine v. Boatmen's Savings Institution*, 57 Mo. 552; and it seems to be essential that there should be this simultaneous delivery, and that it be to accomplish the agreed purpose of securing the payment of the purchase-money, *Gammon v. Freeman*, 31 Me. 243; *Rawlings v. Lowndes*, 34 Md. 639; *Mayburry v. Brien*, 15 Pet. 21. Where the conveyance and mortgage bear different dates of acknowledgment, there is no presumption of simultaneous delivery, *Rawlings v. Lowndes*, *supra*; *Henderson v. Mayor and Council of Baltimore*, 8 Md. 352.

There may be circumstances which will induce a Court of Equity to regard instruments not executed or delivered on the same day as parts of one transaction, so as to bring them within the rule refusing dower. Thus in *Wheatley's Heirs v. Calhoun*, 12 Leigh 264, W. and C. agreed to purchase land, and to divide the same between them in a certain proportion. They, accordingly, bought land from M. and G., agreeing to pay for it in certain instalments, and to give a deed of trust for the price; they took a conveyance, executed a bond for the price, and afterwards executed a deed of trust therefor; neither the wife of C. nor the wife of W. joining in the deed of trust. The Court held the deed of trust paramount to the dower of the wives, on the ground that, although given later than the conveyance, it was in pursuance of the same agreement by which it was given, and was part of the same transaction.

In pursuance of a prior agreement, the mortgage may be made to a third person, who furnishes the purchase-money, to secure him repayment, and as against him the widow cannot have dower, *Clark v. Monroe*, 14 Mass. 351; *King v. Stetson*, 11 Allen 407; *Smith v. Stanley*, 37 Me. 11; *Glenn v. Clark*, 53 Md. 580; and it is held, generally, in *Kettle v. Vanduyck*, 1 Sand. Ch. 76, that the mortgage may, by the assent of the vendor, be made to a third person, and retain all the privileges with reference to dower of a purchase-money mortgage; but in *Jameson v. Garden*, 29 Ill. 199, the Supreme Court of Illinois held that, under the law of that State, a mortgage made to a third person, to secure money borrowed from him to pay for the land conveyed, and delivered on the same day as that on which the deed for the land was received, was not a purchase-money mortgage. If this case can be upheld, it must be on the ground that it can be distinguished from the foregoing cases by the fact that the mortgage did not appear to have been given in pursuance of any prior arrangement between the parties to the sale, and so, perhaps, was not part of the one transaction; and this view of the case is strengthened by the decision in *Smith v. McCarty*, 119 Mass. 519, wherein it was held that a mortgage, executed on the same day that a deed was received, to a third person, to secure the payment of a note given for money borrowed to pay for the land, is not necessarily such a mortgage as will have precedence of dower, and that it must be shown that the deed and mortgage are parts of the same transaction.

A later mortgage cannot be substituted for the purchase-money mortgage and have the like effect, although it is given to secure the payment of money borrowed to pay off the purchase-money mortgage, and that fact is recited in the new mortgage, *Calmes v. McCracken*, 8 So. Car. 87.

In *Gage v. Ward*, 25 Me. 101, O. conveyed to W., and received a purchase-money mortgage; afterwards becoming indebted to G., upon a promissory

note, he agreed with W. to receive the note in part payment for the land. W. then, by agreement with G., procured the discharge of the mortgage, and gave G. a new one for the amount of the note. It was held that G. did not become subrogated to the rights of the purchase-money mortgagee, and the widow of W., not having joined in the mortgage, was entitled to her dower.

The scope of the purchase-money mortgage cannot be extended so as to cover subsequent debts to the prejudice of the widow's dower, *Greer v. Chester's Heirs*, 7 Humph. 77.

It is to be borne in mind that the rule, that where a purchase-money mortgage exists there is not a sufficient seizin to sustain dower in the mortgagor's widow, applies only in favor of the mortgagee and those having his title; as against all others the right of dower is in full force, and is not in the least affected by the mortgage, *Whitehead v. Middleton*, 2 How. (Miss.) 692; *Young v. Tarbell*, 37 Me. 508.

Dower in Surplus of Mortgaged Property.

The widow may have dower in the surplus of property on which is a mortgage superior in right to her dower, *Calver v. Harper*, 27 Ohio St. 464; *Matthews v. Dunjee*, 45 Barb. 69; *Brown v. Duncan*, 4 McCord 346; and see Illinois Rev. St. (1880), Ch. 41, § 5, p. 425; Virginia, Code, Tit. 31, Ch. 106, § 2, p. 853; West Virginia, Rev. St., Vol. 1, Ch. 70, § 3, p. 499; Michigan, Comp. Laws, Vol. 2, Tit. XXII., Ch. 151, § 4273, p. 1360; Wisconsin, R. S., Pt. 2, T. 20, Ch. 98, § 2164; New York, Rev. St. (1882), P. 2, C. 1, T. 3, § 6, p. 2197; Nebraska, Comp. St., Ch. 23, § 5, p. 212; Oregon, Ch. 17, T. 1, § 5, p. 584; and also in the proceeds of an equitable title after satisfying the vendor's lien, *Harrison v. Griffith*, 4 Bush. 146.

Right of Exoneration as against Personal Estate of the Husband.

The widow has a right, as against the personal estate of her husband, to have her dower interest exonerated, *Caroon v. Cooper*, 63 N. C. 386; *Jennison v. Hapgood*, 14 Pick. 345; *Mantz v. Buchanan*, 1 Md. Ch. 202; *Peckham v. Hadwen*, 8 R. I. 160; *Campbell v. Campbell*, 30 N. J. Eq. 415; *Ruffin v. Cox*, 71 N. C. 253; *Henagan v. Harllee*, 10 Rich. Eq. 285.

Deed made on Day of Marriage and Prior thereto.

Where on the day of his marriage, and before its solemnization, the husband has made a deed by which he has conveyed his property, the wife

will be entitled to dower therein, for the two essentials, coverture and seizin, existed upon the same day, *Stewart's Lessee v. Stewart*, 3 J. J. Mar. 48.

Deed in Fraud of Intended Wife will not Prevent Dowable Seizin.

A deed made by the husband shortly before marriage, without the knowledge of his intended wife, and with intent to defeat her dower, will not prevent his being, at least constructively, seized so as to give his wife dower, *Littleton v. Littleton*, 1 D. & B. 327; *Cranson v. Cranson*, 4 Mich. 230; and such a deed will be set aside in the husband's lifetime, *Babcock v. Babcock*, 53 How. Pr. 97; or even after his death, *Brown v. Bronson*, 35 Mich. 415; *Baird v. Stearne*, 39 Leg. Int. 374; S. C. 12 W. N. C. 205. But it seems that such a deed must be made with reference to a particular marriage, or it will be upheld as against dower; thus where, long before marriage, a man made a deed of all his property in trust, to dispose of the same for the support of the grantor, and on his death to account for what remained to the heirs at law, as under the intestate acts, and afterwards married, it was held that the widow could not have dower, *Knickerbacker v. Seymour*, 46 Barb. 198.

But it seems that where a particular marriage is contemplated, the fact that a formal engagement of marriage has not been entered into will not render valid a deed made secretly with reference thereto. In a recent case in the Common Pleas of Philadelphia, *Baird v. Stearne*, 39 Leg. Int. 374, the plaintiff filed a bill to set aside a deed made by her deceased husband, under the following circumstances. The husband, before marriage to the plaintiff, was a widower with three children; he paid attention to the plaintiff, and announced to his friends his intention of marrying her. Three or four days before any actual engagement of marriage had been entered into, he made a deed of his realty in trust for himself for life, and to be conveyed to his children by his first wife, upon his death. He afterwards married the plaintiff. The evidence showed that, during the courtship, the plaintiff had been made aware of the circumstances of her lover, and that at the time of the marriage she was ignorant of the conveyance in trust. The Court regarded the case as falling within the definition of a fraud upon the wife, and set aside the conveyance as against her. THAYER, P. J., in delivering the opinion of the Court, said: "Equity will always set aside deeds and settlements secretly made in contemplation of marriage, where their effect is in derogation of the just expectation of one of the parties to the contract, and of the obligations about to be assumed in that relation. . . .

It is not a question of actual fraud, but whether the effect of the conveyance operates as a fraud upon the just expectations of the party who is wronged, *Robinson v. Buck*, 21 Sm. 392 [71 Pa. St.]; *Duncan's Appeal*, 7 Wr. 67 [43 Pa. St.]; *Beet v. Ferguson*, 3 Grant's Cases 289. It is not necessary in the present case to find that actual fraud was intended either by James Baird or by the trustees who procured him to execute this deed. The weight of the evidence appears to us to be that it was not. Nevertheless, the deed made by James Baird, under the circumstances, was a fraud in law. While a reasonable settlement upon the children of a former marriage would have been, under the circumstances, only a just and proper provision, it cannot be doubted that the secret conveyance by James Baird to the trustees of the bulk of his property, on the eve of his marriage with the plaintiff, was a fraud in law upon her just expectations and the conjugal rights which were about to be acquired by her."

A man may, without being guilty of a fraud upon his intended wife, provide for children of a former marriage, and an advancement to a son, while a second marriage was in contemplation, has been upheld as a valid conveyance, *Baker v. Chase*, 6 Hill 482.

The deed, made in fraud of the wife, is void only as against her, and cannot be avoided by the grantor's heirs, *Rowland v. Rowland*, 2 Sneed 543.

Dying in Possession equivalent to Dying Seized.

Where the law requires that to entitle the wife to dower the husband must die seized, there will be a sufficient seizin if the husband die in possession, although the land was subject to a judgment obtained against the husband before marriage, *Green v. Causey*, 10 Ga. 435; or the husband had agreed to sell and had given a bond for the title, the purchase-money being unpaid, *Day v. Solomon*, 40 Ga. 32; and although the husband be insolvent, *Allen v. Allen's Admr.*, 4 Ala. 556; and where a husband conveyed, in his lifetime, by a deed absolute upon its face, but which was in reality a mortgage, his widow was held entitled to dower, *Turbeville v. Gibson*, 5 Heisk. 565; and a husband is held to have died seized of an equity of redemption, which, although forfeited, had not been foreclosed at the time of his death, *Fish v. Fish*, 1 Conn. 559; but where a sheriff's sale of land of the husband has been made at a time prior to his death, and the statutory period for redemption has expired, and the sheriff has neglected to make a deed to the purchaser, there is no such dying seized as will sustain dower in the execution debtor's widow, *Rose v. Rose*, 6 Heisk. 533, overruling *Harrell v. Harrell*, 4 Cold. 377.

Dower—How Defeated or Barred—By Defeat of Husband's Seizin.

Dower is defeasible by the occurrence of anything which would defeat the husband's seizin *ab initio*, or by the enforcement of any claim or incumbrance which existed prior to the marriage, or to the title of the husband, *Striblong v. Ross*, 16 Ill. 122; *Northcut v. Whipp*, 12 B. Mon. 65; *Waller v. Waller's Admx.*, 33 Grat. 83; as when the estate of the husband is evicted by title paramount, as by the enforcement of a mortgage made before marriage, *Fox v. Pratt*, 27 Ohio St. 514; *Calver v. Harper*, Id. 464, or subject to which the husband took this title, *Cheek v. Waldrum*, 25 Ala. 152; or of a judgment antedating the marriage, *Trustees of Poor of Queen Anne's County v. Pratt*, 10 Md. 5; *Robins v. Robins*, 8 Blackf. 174; *Sanford v. McLean*, 3 Paige 117. The judgment must, however, antedate the marriage, for since, except in a few States noted hereafter, the claim of dower is superior to the rights of creditors, *Calder v. Bull*, 2 Root 50; *Crocker v. Fox*, 1 Id. 227; *Cavender v. Smith*, 8 Iowa 360; it is not sufficient that the debt existed before marriage if the judgment were not recovered until after it, *Griffin v. Reece*, 1 Harring. 508; a judgment, evicting the husband's estate, obtained by collusion, procurement, or covin, will not affect the wife's right of dower; see Kentucky, Gen. St., Ch. 52, § 8, p. 530; Ohio, R. L., Pt. 2, T. 4, Ch. 3, § 4193; Illinois, Rev. St., Ch. 41, § 16, p. 427; New Jersey, Rev. of 1877, p. 321, pl. 5; Missouri, Rev. St., Vol. 1, Ch. 29, § 2187, p. 363; Arkansas, Rev. St., Ch. XLIX., § 2225; West Virginia, Rev. St., Ch. 70, § 13, p. 502; Virginia, Code, Tit. 31, Ch. 106, § 13, p. 855. Where a sale of land is set aside by a decree of Court, the dower of the vendee's wife is defeated, *Waller v. Waller's Admx.*, 33 Grat. 83.

Exercise of Right of Eminent Domain.

Dower is also barred where the State, by virtue of the right of eminent domain, takes possession of the land in which it is claimed, *Moore v. City of New York*, 4 Sand. Sup. Ct. 456, S. C., on appeal, 8 N. Y. 110; *French v. Lord*, 69 Me. 537; but not by a deed of the husband, dedicating the property to public uses, *Nye v. Taunton Branch R. R. Co.*, 113 Mass. 277. In the case of *Gwynne v. City of Cincinnati*, 3 Ohio 24, however, the Supreme Court of Ohio refused to recognize the distinction adverted to above, and held dower barred where land had been devoted to the public use, as a market, by contract between the owners and the public. The distinction, however, seems a well-founded one; for while the public, acting in its sovereign capacity, may undoubtedly override private rights (except so far as it has limited itself by its fundamental law), yet it can only do so

when it acts in its sovereign capacity, and not when it chooses to deal with a private individual by way of contract, or to accept from him a donation of land; when it so acts, it acts rather as a private party to a contract, and is subject to the rules governing such a party.

Where the wife's right of dower is extinguished by the exercise of the right of eminent domain, the better opinion appears to be that equity will protect the wife's interest by securing to her that portion of the fund awarded to the husband in compensation for the land taken, which properly represents her inchoate dower. This is the conclusion arrived at by the Court of Errors and Appeals of New Jersey, and announced in a very interesting opinion by REED, J., in *Wheeler v. Kirtland*, 27 N. J. Eq. 534. The Court fully recognizes the law to be that the right of dower cannot be asserted against the public interest, and that when once properly condemned and taken, the land in its totality, with all interests and estates therein, passes absolutely to the public, and that no deduction should be made in an assessment of value for the worth of the wife's inchoate dower, but rests the rule solely on the principle of the superiority of the public to all private interests, and criticises and condemns the ground taken in *Moore v. City of New York*, *supra*, in reaching the same conclusion, viz., that "the wife had no interest in the land, and the possibility she did possess was incapable of being estimated with any degree of accuracy."

The doctrine of *Moore v. City of New York* is not sustained even in its own State by the later authorities; see *Simar v. Canaday*, 53 N. Y. 298, and the remarks of INGRAHAM, P. J., in *The Matter of the Extension of Central Park*, 16 Abb. Pr. 69.

Dower not affected by Act or Conveyance of the Husband during Coverture.

As a rule, no act, conveyance, deed, or incumbrance of the husband alone during the coverture, can affect the right of dower, *Rank v. Hanna*, 6 Ind. 20.

The husband cannot convey lands so as to bar the wife's dower, unless she assent in due form. This, which is the common law, is the subject of express enactment in some of the States. See Missouri, Rev. St., Ch. 29, § 2197, p. 365; Illinois, Rev. St. (1880), Ch. 41, § 16, p. 427; Arkansas, Rev. St., Ch. XLIX., § 2225.

And the rights of the wife are not affected by the fact that the purchaser, against whom dower is claimed, bought the property in ignorance that any claim for dower had attached thereto, and gave a full price therefor, *Dick v. Doughten*, 1 Del. Ch. 320.

Effect of Conveyance in States where Dower is given only where Husband Died Seized.

The law is otherwise in those States in which the widow is dowable only of lands of which the husband died seized; but even there his right to dispose of property in which his wife has a possibility of dower is not absolutely unfettered; and while he may, so long as he acts in good faith, sell or dispose of his property at his will, yet he will not be permitted, by a voluntary conveyance, or one in the whole or in greater part a gift, made with intent to defeat his wife's dower, to accomplish that object; but the widow, as against such a conveyance, will be entitled to dower, *Thayer v. Thayer*, 14 Vt. 107; *Den ex d. Hughes v. Shaw*, M. & Y. 323; *Jiggitts v. Jiggitts*, 40 Miss. 718; *Davis v. Davis*, 5 Mo. 184; *Tucker v. Tucker*, 32 Id. 464, 29 Id. 350.

In *Thayer v. Thayer*, the Court considered and dissented from *Stewart v. Stewart*, 5 Conn. 317, in which the Supreme Court of Errors of Connecticut had held that until the death of the husband the wife had no such right to her dower that it could be the subject of a fraud. A deed, even, for which full consideration has been given, has been held void as to the widow where the grantee knew that the object of the deed was to deprive her of her dower, *Brewer v. Connell*, 11 Humph. 500; but a conveyance on good consideration only will not necessarily be held void, no intent to bar dower having been proved, *McIntosh v. Ladd*, 1 Humph. 459; *Tate v. Tate*, 1 D. & B. Eq. 22. And see, upon this subject, the statutes of Vermont, T. 15, C. 114, § 2228; and Tennessee, Pt. 2, T. 3, Ch. 3, § 2406.

While the husband can bar his wife's dower by a *bona fide* conveyance, yet such conveyance will not be assumed, and the husband cannot, by merely neglecting to bring suit for lands to which he was entitled until his claim is barred by the statute of limitations, deprive his wife of her dower, *Hart v. McCollum*, 28 Ga. 478; and the widow's right is not defeated by a parol sale and delivery of possession, although the vendee has paid part of the price, for the widow's equity in superior, and the vendee will not even be given a lien on the property, but will stand as an ordinary creditor, *Williams v. Dawson*, 3 Sneed 316.

Where, however, a conveyance has been made during the husband's lifetime, but is not registered until after his death, the registration will relate so as to affect the widow's right of dower, *Norwood v. Marrow*, 4 Dev. & B., Law 442.

In Connecticut, it is held that a tenant in tail may bar his wife's dower by a conveyance in fee, although such conveyance is not good against the heir in tail, and vests but a base fee, determinable upon the grantor's death, in the grantee, *Whiting v. Whiting*, 4 Conn. 179.

It was formerly held in Tennessee that a conveyance in mortgage so vested the fee in the mortgagee that the dower of the mortgagor's wife would be barred, *Kuhn v. Feiser*, 3 Head 82; *McIver v. Cherry*, 8 Humph. 713; this was under the North Carolina act of 1784; but see *Den ex d. Taylor v. Fen and Parsley*, 3 Hawks. 125 (which was decided under the same act); but by the Act of 1855-6, Code, § 2399, dower is given where the husband, mortgagor, dies before foreclosure and sale, *Boyer v. Boyer*, 1 Cold. 12; *Tarpley v. Gannaway*, 2 Id. 246; *Harrell v. Harrell*, 4 Id. 377; this act, however, does not extend to land mortgaged or conveyed in trust before marriage, *Boyer v. Boyer*, *supra*.

Mortgage by Husband.

A mortgage made by the husband and not joined in by his wife, will be of no effect against her dower, *Hinchman v. Stiles*, 1 Stock. 361; *Hayes v. Whitall*, 2 Beas. 241; and her rights are not affected if, without her complicity, the husband represented himself to the mortgagee as unmarried, *Westfall v. Hintze*, 7 Abb. N. C. 236; and after her inchoate right attaches, the wife is not bound by the recitals or admissions of her husband; hence, where, a few weeks after receiving a deed for certain land, the husband executed a mortgage, in which his wife did not join, reciting therein that it was a purchase-money mortgage, it was held that the recitals could not be given in evidence to show that it was such a mortgage, and, as such, superior in right to dower, *Tibbetts v. Langley Manuf. Co.*, 12 So. Car. 465.

The foreclosure of a mortgage, in which the wife did not join, will not affect her dower, *Gold v. Ryan*, 14 Ill. 53; *McMahon v. Russell*, 17 Fla. 698; even if she is made a party to the foreclosure proceedings, unless the dower-right is expressly put in issue, *Mooney v. Maas*, 22 Iowa 380; and the mere allegation in a bill, that the widow claims an interest, without referring to or describing the dower, and making the widow a party to the suit, as a devisee, will not put the right in issue so as to render the dower barred by a decree, *Lewis v. Smith*, 11 Barb. 152, on appeal 9 N. Y. 502; and see *Wade v. Miller*, 32 N. J. Law 296.

The law in Pennsylvania upon this point is different; there the mortgage of the husband alone is good as against the wife, and its enforcement will effectually defeat her dower. This was settled law in that State at an early day, for in *Scott v. Croasdale*, 1 Yeates 75, S. C. 2 Dallas 127, decided in 1791, Chief-Justice MCKEAN, referred to a decision to the same effect, some thirty years back, and accounted for it on the general principle of the policy of Pennsylvania in rendering all lands subject to the owner's debts; and see *Killingier v. Smith*, 6 S. & R. 534.

The husband, however, will not be allowed to use his power for the mere purpose of defrauding his wife, under cover of the forms of law. Thus where a husband mortgaged his land, and suffered a judgment to be entered on a *scire facias* on the mortgage, for the purpose of defeating his wife's dower, and the mortgagee had constructive notice of the wife's right, it was held that, on an appeal to the equitable power of the Court, the wife would be entitled to have the judgment opened and be let into a defence to the extent of her dower, even after her husband's death, *McClurg v. Schwartz*, 6 W. N. C. 361; S. C. 87 Pa. St. 521.

Effect of Judgment and Execution against Husband.

Dower will not be affected by a judgment obtained against the husband after marriage, *Stuart v. Beard*, 4 Md. Ch. 319; or by a sale on an execution thereunder, *Wakeman v. Roache*, Dudley 123; *Harrison v. Eldridge*, 2 Hals. 392; *Griffin v. Reece*, 1 Harring. 508; *Barker v. Parker*, 17 Mass. 564; *Fleeson v. Nicholson*, Walk. (Miss. Rep.) 247; *Pense v. Hixon*, 8 Iowa 402; although the property sold is subject to a mortgage in which the wife had joined, and the proceeds of the sale were applied to the satisfaction of the said mortgage, *Taylor v. Fowler*, 18 Ohio 567.

In North Carolina, during the period in which dower was given only in the lands of which the husband died seized, it was held that where a levy and sale upon execution took place in the lifetime of the husband, and the deed was delivered after his death, the delivery would relate and the widow's dower would be defeated, *Den ex d. Davidson v. Frew*, 3 Dev. Law 3; but where the execution issued only in the lifetime of the husband, the widow could have her dower, *Frost v. Etheridge*, 1 Dev. Law 30, overruling *Hodges v. McCabe*, 3 Hawks 78.

In Tennessee it is held, that where, after a levy upon the land of the husband, he dies, the wife may have her dower, *Rutherford v. Read*, 6 Humph. 423; and where a levy and sale take place in the lifetime of the husband, who dies before the delivery of the sheriff's deed, a delivery of the deed after the husband's death will not relate so as to divest the dower, *Harrell v. Harrell*, 4 Cold. 377.

In Georgia the right of dower is superior to a judgment, even where the judgment has been obtained before the marriage, *Simmons v. Latimer*, 37 Ga. 490.

In Pennsylvania, the sale of the land at sheriff's, or other judicial sale, will bar dower, *Directors of the Poor v. Royer*, 43 Pa. St. 146; and that even where the debt was not a lien at the time of the husband's death, and the judgment upon which the execution issued was obtained subsequently,

Id.; for, said WOODWARD, J., "A widow's dower must wait on the payment of debts, whether lien or no lien; she is dowable of only what remains of the husband's estate after the payment of his debts; not after the payment of liens merely, but *debts*. Debts of a decedent, as such, are liens; though, so far as dower is concerned, this is immaterial, for she is no more effectually postponed to liens than she is debts."

In accordance with the Pennsylvania policy of subjecting lands to debts, dower will be barred by a sale under a testamentary power to pay debts, *Hannum v. Spear*, 1 Yeates 553; *Mitchell v. Mitchell*, 8 Pa. St. 126.

In Iowa, a sale of the husband's lands, on execution or other judicial sale, will bar her right to the one-third of the land in fee, which is in reality a dower, Annotated Sts. (McClain 1880), Tit. XVI., ch. 4, § 2440, p. 653; but the wife will be protected against a fraudulent contrivance to deprive her of dower by means of a sheriff's sale, *Buzick v. Buzick*, 44 Iowa 259.

In Indiana, under the Act of March 11, 1875, 1 Rev. St. (1876), p. 554, where a judicial sale of the husband's realty is made, and the Court does not direct the wife's inchoate interest to be barred thereby, her interest is not only saved, but the wife will become entitled to the possession of her one-third of the land sold, as though the husband were dead, *Jackman v. Nowling*, 69 Ind. 188; *Ketchum v. Schicketanz*, 73 Id. 137; and the same applies in the case of a conveyance by the husband's assignee in bankruptcy, *Roberts v. Shroyer*, 68 Ind. 64; *McCracken v. Kuhn*, 73 Id. 149; *Warford v. Noble*, 9 Biss. 320.

In Maryland, where lands are sold for the husband's debts upon proceedings to which the wife is a party, she will be bound by a decree that the land be sold free of dower, *Gardiner v. Miles*, 5 Gill 94.

Sale for Taxes.

Dower will not be barred by a sale of the husband's property for unpaid taxes, *Blodget v. Brent*, 3 Cr. Cir. Ct. 394; *Walsh v. Wilson*, 130 Mass. 124; but the law is otherwise in Ohio, the Court proceeding upon the ground that a tax title had no connection with any previous chain, but was the result of "a breaking up of all previous titles," *Jones v. Devore*, 8 Ohio St. 430; and it is presumed, that wherever the claim of the husband's debts is made superior to that of dower, a tax sale will bar dower.

Effect of Assignment for Benefit of Creditors.

Dower will not be barred by a voluntary assignment made by the husband, for the benefit of creditors, in which the wife does not join, and a

subsequent sale, by the assignee, for the purposes of his appointment, *Dwyer v. Garlough*, 31 Ohio St. 158; *Crittenden v. Woodruff*, 11 Ark. 82. This is the law even in Pennsylvania, *Keller v. McMichael*, 2 Yeates 300; *Helfrich v. Obermyer*, 15 Pa. St. 113; *Blackman's Est.*, 6 Phila. 160.

And the law is the same in the case of an involuntary assignment under compulsory process, *Eberle v. Fisher*, 13 Pa. St. 526. In delivering the opinion of the Court, BURNSIDE, J., said: "There is no case in our books which carries the extinguishment of a widow's right of dower beyond a judicial sale, and this is not that; this is no more than a voluntary conveyance. The husband had his choice, whether to lie in prison, on the *ca. sa.*, or surrender his property to his creditors, under the then existing insolvent laws. He chose the latter; but there is nothing in these insolvent laws which commanded or authorized him to surrender the incipient rights of his wife. . . . Our insolvent laws required the assignment to be made when the unfortunate debtor was in custody; he must so make it to obtain his discharge; his creditors designated, and the Court appointed the trustee. The interest which his assignee had, was precisely his interest and no more, *Krause v. Beitel*, 3 Rawle 199. The trustee stands in the shoes of the insolvent; he sells his effects real, personal, and mixed; he collects his debts, and he divides the fund, according to law, among the creditors; if a surplus, he returns it to the debtor. The wife is not named in our insolvent laws; and if the insolvent has real estate which is sold by the trustee, and she survives her husband, she is entitled to dower in that estate."

Bankruptcy.

Dower is not barred by a sale by the assignee in bankruptcy of the husband under the United States bankruptcy acts, *Worcester v. Clark*, 2 Grant 84; *Speake v. Kinard*, 4 S. Car. 54; *Re Bartenback*, 11 N. B. R. 61; *Re Angier*, 4 Id. 619; *Roberts v. Shroyer*, 68 Ind. 64; *Lazear v. Porter*, 87 Pa. St. 513, S. C. 6 W. N. C. 321, 7 Reporter 216; *Cooper v. Tabor*, 8 W. N. C. 341.

In *Worcester v. Clark*, the decision was rested entirely on the phraseology of the Bankrupt Act of 1841, which saved the "lawful rights of married women;" but in *Lazear v. Porter*, this reason of decision was disapproved, and dower was upheld on the broad ground of the resemblance between bankruptcy and insolvency proceedings; that the restrictions upon dower should not be multiplied, and that in the absence of express divestiture of dower by the statute, it should not be permitted to be inferentially prejudiced or destroyed. Accordingly, where, by a direction of the Court of Bankruptcy that the sale of certain property, held by the bankrupt subject to a mortgage,

in which the wife had not joined, should be made free of dower, a sale is made by the assignee, the right of dower is not divested, *Re Bartenback, supra*.

Dower Superior to Mechanic's Lien.

The imposition of a mechanic's lien upon the property through a contract with the husband, and its subsequent enforcement against the premises, will not affect the right of dower, *Bishop v. Boyle*, 9 Ind. 169; *Gove v. Cather*, 23 Ill. 634; *Shaeffer v. Weed*, 8 Id. 513; *Pifer v. Ward*, 8 Blackf. 252; *Van Vrouker v. Eastman*, 7 Metc. 162; *Mark v. Murphy*, 76 Ind. 534. The reason of the rule is well stated by GORKINS, J., in *Bishop v. Boyle*: "The mechanic bestows his labor with a knowledge of her [the wife's] prior right, and he knows the house he is building, as brick is added to brick, and nail after nail is driven, becomes real estate. He can protect himself by security, or not venture. She is passive, and can do nothing."

The case of *Nazareth Literary and Benevolent Institution v. Lorne*, 1 B. Mon. 257, is contrary to the course of authority, unless the circumstance that the property was subject, at the time the mechanic's lien attached, to a vendor's lien, had the effect of preventing a dowable seizin before the mechanic's claim became a lien. This explanation of the case derives strength from *Wilson v. Davisson*, 2 Rob. (Va.) 384, which denies that dower can be had even in the surplus, where land, subject to a vendor's lien, is applied to the payment of debts.

Decree for Specific Performance of Contract of Sale—or Execution thereof after Husband's Death.

Where the husband has made a contract for the conveyance of land, and dies before its fulfilment, a decree for specific performance against his widow and heirs will not bar dower; for it was in the husband's power to contract with reference to his own interest alone, and not to that of the widow, *Grady v. McCorkle*, 57 Mo. 172; nor will dower be affected by the execution of such a contract by an administrator or executor, by virtue of an order of Court, *Riddlesberger v. Mentzer*, 7 Watts 141; or by the administrator without such an order, *Covert v. Hertzog*, 4 Pa. St. 145; but where, in pursuance of an order of Court, under such circumstances, a deed was executed by the administrator, and by the widow, who was also administratrix, but who did not *sign* herself as such, though so described in the deed, and which, without expressly mentioning dower, conveyed all the "estate, title, interest, and property" of the widow, it was held that the conveyance would bar the widow's dower, *Thomas v. Harris*, 43 Pa. St. 231.

A sale by virtue of foreclosure proceedings upon a purchase-money mortgage, will not deprive the wife of a right to redeem, *Bell v. Mayor of New York*, 10 Paige 49; *Wheeler v. Morris*, 2 Bosw. 524.

Where the husband has mortgaged an equity of redemption, and the mortgagee has entered and taken possession of the mortgaged premises, the widow can have her dower, unless, being duly notified after her husband's death that the possession is adverse, and for a foreclosure, she rests upon her rights until barred by the statute of limitations at law, or her claim has become stale in equity, *Lund v. Woods*, 11 Met. 566.

Bar by Proceedings upon a Mortgage in which Wife has Joined.

Where the wife joins in a mortgage, its enforcement will bar her dower, *Frost v. Peacock*, 4 Edw. 678; *Watson v. Clendenin*, 6 Blackf. 477; *Baker v. Fetters*, 16 Ohio St. 596; and this has been held where the foreclosure was against the husband alone, *Riddick v. Walsh*, 15 Mo. 519; but it seems to have been more generally held that it is necessary to join the wife, *Harrison v. Eldridge*, 2 Hals. 392; *McArthur v. Franklin*, 15 Ohio St. 485; *McArthur v. Franklin*, 16 Id. 193; *Ketchum v. Shaw*, 28 Id. 503; and see *Mills v. Van Voorhies*, 20 N. Y. 412; and that the dower-right must be in issue; see *Moomey v. Maas*, 22 Iowa 380.

If the wife is an infant at the time of joining in the mortgage, she is not barred of her dower, *Glenn v. Clark*, 53 Md. 580; except in the case of her joinder in a purchase-money mortgage; but in that case the bar rests on the superior equity of the mortgagee, and not on the wife's joinder, *Id.*

The sale may be on proceedings taken after the husband's death, and yet bar dower, *Mead v. Mead*, 39 Iowa 28; *Graves v. Braden*, 62 Ind. 93.

It has been held that where a mortgage has been joined in by the wife, her dower will be barred by a sale, after the husband's death, for the same debt as that for which the mortgage was given, *St. Clair v. Morris*, 9 Ohio 15; *Mead v. Mead*, *supra*; but this statement of the law would seem to be by no means without opposition. In *Harrison v. Eldridge*, 2 Hals. 392, BOUNDNOT, J., said: "If he [the mortgagee] files a bill in equity to foreclose, the wife, having joined in the mortgage, must be made a party; and, being brought before the Court, they must either redeem or submit to have the equity of redemption foreclosed, by which the wife's right to dower in the premises is forever barred; or the lands may be sold by a decree of the Court, by which the rights of both the defendants will be transferred to the purchaser under the sale, who will hold the property free from every claim on the part of either husband or wife.

"If, however, the creditor or mortgagee proceed simply to sue on his bond,

and obtain judgment, the execution issued thereon may be levied, indifferently, on all the property of the defendant, as well that not included in the mortgage as that specifically pledged. If the mortgaged premises are levied upon and sold under it, the estate conveyed by the sheriff to the purchaser, depending wholly upon the judgment and execution, is in no manner affected by the circumstance that a mortgage had been previously given. The mortgagee may be considered a party to the proceedings, and it would be questionable, at least, whether, having treated the property as the estate of his mortgagor, he should not be estopped from ever setting up a claim under the mortgage. Supposing Harrison himself, without the intervention of the sheriff, and without any proceedings on the part of the mortgagee, had made the sale and conveyance to the present defendant, and had himself applied the proceeds of the sale to paying off the mortgages, can a question exist as to the consequences which would legally result from the measure? would not the mortgages, after the satisfaction, be as if they had never been, and the wife's right to dower, which had not been absolutely extinguished, but only conditionally suspended, be renewed in all its strength?

"If the purchaser would derive any benefit from the wife's having joined in the deed of mortgage for the security of the debt, he may, if he has an equitable title to it, obtain an assignment of the mortgage; he will then stand in the same situation in which the mortgagee would have stood had he reduced the mortgaged premises into possession without foreclosing the equity of redemption, but certainly in no better.

"If a contrary doctrine were established, the consequences would be as was forcibly urged in the argument, that a husband, by inducing his wife to join in a mortgage for a debt, however inconsiderable, would acquire an absolute control over her right to dower, and might deprive her of her interest in an estate of the greatest value. She could not in any manner prevent the bringing of an action on the bond on any of the subsequent proceedings. Her joining in what is called a mere mortgage, therefore, would be not merely pledging her interest as additional security for the payment of the debt, but a total disposition of her estate, an absolute, not a defeasible, conveyance."

The ground upon which the cases which hold the contrary rule are based is well expressed by MILLER, C. J., in *Mead v. Mead*: "It is not the kind of proceedings instituted to bar dower that has that effect, but the relinquishment by the wife gives the mortgagee, through the means of the courts, the power to subject it to sale for the payment of the debt."

The joinder in the mortgage is effectual, as a bar to the widow's dower, only in favor of the mortgagee, *Rutherford v. Munce*, Walk. (Miss. Rep.)

370; *Tabele v. Tabele*, 1 Johns. Ch. 45; *Hildreth v. Jones*, 13 Mass. 525; *Klinck v. Keckley*, 2 Hill Ch. 250; *Wheeler v. Morris*, 2 Bosw. 524; or of those who equitably take his place, *Dearborn v. Taylor*, 18 N. H. 153; and hence the widow will have dower in the surplus of the mortgaged land, after satisfying the mortgage, *Keith v. Trapier*, 1 Bailey Eq. 63; for the effect upon dower of the wife joining in a mortgage, is not so much to convey the dower as to create a bar to attend the husband's conveyance—to endure while it endures, to cease when that conveyance becomes inoperative, *Rickard v. Talbird*, Rice Eq. 158; and the widow's right is so far recognized, that where she had joined in a mortgage to secure a debt, payable by instalments, and part having been paid, it was found, after the husband's death, that the balance could be paid by a sale of a portion of the land, it was held that the income of the wife's share of the residue could not be taken to pay instalments not yet due, *Bank of Ogdensburgh v. Arnold*, 5 Paige 38; and where a sale is made of land subject to a mortgage, superior to the wife's dower, a chancellor will protect that right so far as is consistent with the equities of the mortgagee, *Fry v. Merchants' Ins. Co.*, 15 Ala. 810.

Effect of Extinguishment of Mortgage.

When a mortgage, which, whether because it has been joined in by the wife, or because it is an ante-nuptial or a purchase-money mortgage, is superior to the claim of dower, is paid and extinguished, the husband's seizin is relieved of the incumbrance, and at once becomes one that will support dower, *Atkinson v. Stewart*, 46 Mo. 510. This may be by relation; and if the mortgage is paid off by the husband or his heir, or personal representative, there can be no question as to the effect of the transaction; but when it is claimed that the payment, or act of a purchaser of the equity of redemption, or the mortgagee constitutes such an extinguishment, there is more doubt.

It has been held, that where the purchaser of the equity of redemption buys the mortgage from the mortgagee pending the life of the mortgagor, in that case there is such an extinguishment that the latter's widow will be entitled to her dower, *Collins v. Torrey*, 7 Johns. 278; *Coates v. Cheever*, 1 Cowen 460; but in *Popkin v. Bumstead*, 8 Mass. 491, the Court held that, on the purchase of an equity of redemption, the purchaser had the right to pay off the mortgage, and thus relieve his estate of an incumbrance; and having all the equitable interest himself, when he paid the money, the legal estate followed the equitable, and he became seized of the whole fee. The Court further said, that if this were not the plain, legal effect of the transaction, the law would construe the discharge of the mortgage by the

mortgagee, a release by him to the tenant, who had become lawfully possessed of the equitable interest, and from whom the consideration of the discharge flowed; and see *Hinds v. Ballou*, 44 N. H. 619.

It is held in many cases, that where the assignee of the equity of redemption pays the amount of the mortgage and takes an assignment thereof, he may keep the mortgage alive, so as to protect himself against the widow's claim, *Hartshorne v. Hartshorne*, 1 Green Ch. 349; *Atkinson v. Angert*, 46 Mo. 516; *Sargeant v. Fuller*, 105 Mass. 119; *De Lisle v. Herbs*, 32 N. Y. S. C. 485; but where the tenant pays off the debt absolutely, the mortgagor's widow will have dower, *Atkinson v. Angert*, *supra*; *Mathewson v. Smith*, 1 R. I. 22; *Runyan v. Stewart*, 12 Barb. 537; and the omission to take an assignment has been considered evidence that the mortgage was not to be kept alive as against the dowress. Thus in *Wedge v. Moore*, 6 Cush. 8, as appears by the report, which is not a very good one, land was subject to three mortgages, the widow having joined in the second only; the third mortgagee paid off the two prior mortgages without the knowledge of the mortgagor, it was held that the widow could have dower as against the third mortgagee, SHAW, C. J., said: "The fact that the tenant obtained a discharge of the mortgage and did not take an assignment, leads to the conclusion that he was to pay the mortgagor himself, as part of the purchase-money."

In *Eaton v. Simonds*, 14 Pick. 98, the purchaser of an equity of redemption paid the mortgage debt, and intended to take an assignment of the mortgage, but being told that it would be unnecessary to do so, he had the mortgage discharged of record, it was held that the dower of the mortgagor's widow was unincumbered; and see *Carter v. Goodin*, 3 Ohio St. 75.

The mere fact that a person, whose duty it is to pay a debt secured by a mortgage, does so, and, instead of having the mortgage satisfied, takes an assignment thereof, will not have the effect of keeping it alive as against dower, *Brown v. Lapham*, 3 Cush. 351; it will be held to be a discharge, though an assignment in form, *Hatch v. Palmer*, 58 Me. 271.

The true rule in cases of a formal assignment seems to be that stated by PARKER, C. J., in *Gibson v. Crehore*, 3 Pick. 475: "When the purchaser of a right to redeem takes an assignment, this shall or shall not operate as an extinguishment of the mortgage, according as the interest of the party taking the assignment may be, and according to the real intent of the parties." And see also *Simonton v. Gray*, 34 Me. 50; *Toomey v. McLean*, 105 Mass. 122; and in *Carll v. Butman*, 7 Me. 102, a quit-claim from the mortgagee to the purchaser was held to take effect as an assignment.

When the mortgagee, or his assignee, purchases the equity of redemption, he will have a right to prevent a merger of his mortgage with the

fee, so as to protect himself against the claim for dower, *Thompson v. Boyd*, 1 Zab. 58; and the mere fact that he buys the equity, will not give dower as against him; each case will depend upon its own circumstances, *Eldridge v. Eldridge*, 1 McCart. 195; *Woodhull v. Reid*, 1 Harr. 128; *Russell v. Austin*, 1 Paige 193; *Opdyke v. Bartles*, 3 Stock. 133.

In *Ketchum v. Shaw*, 28 Ohio St. 503, K. and wife executed a mortgage, which mortgage was assigned to B. K. afterwards failed in business, and made an assignment, for the benefit of creditors, to B., who, under an order of Court, sold the mortgaged premises, which brought more than the mortgage debt; the personalty also brought more than the said debt. It was held that K.'s wife could have dower.

In *Woods v. Wallace*, 30 N. H. 384, it was held that where, after the death of a husband, the holder of a mortgage upon his land purchased the equity of redemption, the widow was entitled to dower upon contributing to the redemption of the mortgage; that prior to his purchase the mortgagee could have insisted upon payment of the whole debt, but afterwards, as owner of the equity, to that of a portion only.

Effect of Redemption by Personal Representatives of the Husband.

Where the mortgage is redeemed by the husband's personal representatives, the widow may have dower without being required to contribute to the discharge thereof, *Rossiter v. Cossit*, 15 N. H. 38; but see *Trowbridge v. Sypher*, 55 Iowa 352; but in favor of one having an interest in the redemption, the widow must contribute if she would have dower, *Rossiter v. Cossit*, *supra*; *Woods v. Wallace*, *supra*; and see *Newton v. Cook*, 4 Gray 46; and see Michigan, Comp. Laws, Vol. 2, Tit. XXII., Ch. CLI., § 4274; Wisconsin, Rev. St., Pt. 2, Ch. 98, § 2165; Nebraska, Comp. St., Ch. 23, § 6, p. 213; Oregon Sts., Ch. 17, Tit. 1, § 6.

In Vermont, it is provided by statute, that where payment is made either by the personal representative or the heir, the widow's dower shall be diminished by such payment, Sts., Tit. 15, Ch. 114, § 2217, p. 450; and in Iowa, it has been held that the widow's distributive share of mortgaged property must bear its proportion of the mortgage debt, even where a sale is made by leave of Court for the purpose of paying the husband's debts, *Trowbridge v. Sypher*, 55 Iowa 352; from this decision BECK, J., dissented.

Effect of Charge.

Where lands come to the husband subject to a charge, the dower of the wife must contribute to the charge, *Clough v. Elliott*, 23 N. H. 182.

Effect of Performance of a Condition.

Where a mortgage is given to secure the performance of a condition, and the condition is discharged, the right of dower becomes absolute, *Lanfair v. Lanfair*, 18 Pick. 299.

Effect of Common Recovery Suffered by Husband Alone.

A common recovery, suffered by a tenant in tail, to which the wife is not a party, will not affect her dower, *Sharp v. Pettit*, 1 Yeates 389.

Effect of Partition.

Where the husband is seized of an undivided portion of a piece of land, and partition is made, in good faith, between him and his co-tenants, by deed, the wife is bound by such partition, and can claim dower only in the portion assigned to her husband in severalty; for it is an incident of an estate in common, that any tenant may be compelled to make partition, and the marriage gives a right of dower subject to the contingency of partition being enforced, *Potter v. Wheeler*, 13 Mass. 504; *Totten v. Stuyvesant*, 3 Edw. 500; *Matthews v. Matthews*, 1 Id. 565; *Mosher v. Mosher*, 32 Me. 142; but if the proportions assigned to the different tenants are made essentially uneven, for a pecuniary or other consideration, the widow of a tenant receiving a smaller proportion than independently of the collateral consideration he would have been entitled to, will not have her dower-right confined to the land set out to her husband. *Cases supra*.

The widow is also bound, by proceedings at law, in partition where the land is actually divided, *Wilkinson v. Parish*, 3 Paige 653; and it seems in such case she need not have been made a party to the proceedings, *Matthews v. Matthews*, *supra*; but where there is sale of the land by an order of Court, in partition, the wife must have been made a party, or her dower is not barred, *Wilkinson v. Parrish*, *supra*; *Warren v. Twilley*, 10 Md. 39; *Jordan v. Van Epps*, 26 N. Y. S. C. 526; 85 N. Y. 427; *Kent v. Taggart*, 68 Ind. 163.

In *Lee v. Lindell*, 22 Mo. 202, it was held that the wife was barred by proceedings in partition to which she was not a party, and that when, by virtue of an act of Assembly, the husband received a sum of money in lieu of his share of the land, the dower of the wife was divested. LEONARD, J., dissented, holding that the wife should be made a party, so that her contingent right might be protected by securing it on the proceeds of the sale.

In the spirit of this dissent is the legislation of Michigan and Wisconsin, which provides that, in proceedings in partition, the Court may order a payment in gross, to be made in lieu of dower, if the dowress assent to it, or may order the sum to be invested to secure dower, Michigan, Comp. Laws, Vol. 2, Tit. 31, Ch. 196, §§ 6310, 6311, 6312, 6313, pp. 1785-6; Wisconsin, Pt. 2, Tit. 26, Ch. 134, §§ 3121-3125, p. 811.

Effect of Exchange.

In the case of an exchange of lands between a husband and a third person, there would be, on the part of the husband, sufficient seizin to give his wife dower in both pieces of ground; and yet justice and equity would seem to forbid that the widow should take dower in both; and yet it would be unjust to confine her to the land received, for in that case a door would be opened to fraud, and an exchange might readily be made simply a deprivation of dower by another name; accordingly, we find, in several of the States, acts passed providing that, in case of such exchange, the wife shall make her election of which piece she will be endowed, Illinois, Rev. St. (1880, Hurd), Ch. 41, § 17, p. 427; Arkansas, Rev. St., Ch. XLIX., § 2212; Michigan, Comp. Laws, Vol. 2, Tit. XXII., Ch. CLL., § 427; Wisconsin, Rev. St., Pt. 2, Tit. 20, Ch. 98, § 2161, p. 626; Nebraska, Comp. St., Pt. 1, Ch. 23, § 2; New York, Rev. St. (1882), Pt. 2, Ch. 1; Oregon, Ch. 17, Tit. 1, § 2; and this, in all probability, would be held to be the general law wherever the question should arise; see *Stevens v. Smith*, 4 J. J. M. 64.

In order, however, to put the widow to her election, the exchange must be one falling within the definition in 2 Blackst. Com. 323, viz., "a mutual grant of equal interests, the one in consideration of the other;" and where the exchange was of an equity in seventy-five acres, for eleven acres and a sum of money, the widow was not put to an election, *Wilcox v. Randall*, 7 Barb. 633; and where A. conveyed his farm to B., and B. his to A., and the deeds did not set out an exchange, it was held that there had been no proper exchange, and that the widow could take dower in both farms, *Cass v. Thompson*, 1 N. H. 65.

In New York, Michigan, Wisconsin, Nebraska, and Oregon, the election must be made within one year after the husband's death, or the widow will be confined to the land received by the husband; see statutes cited, *supra*.

Vendor's Lien Superior to Dower.

Dower is subject to the vendor's lien. In *Wilson v. Davisson*, 2 Rob. (Va.), 384, BALDWIN, J., said: "A wife's right of dower is an emanation

from the ownership of her husband, and subject to all its qualifications, though not to his alienation or incumbrance during the coverture, without her consent, declared in the mode prescribed by law. The right is dependent upon his as existing at the inception of the coverture, or as acquired by him during its continuance. . . . If the purchase-money be unpaid and not secured, an equitable mortgage is embodied in the transaction itself, and if that be foreclosed by a sale of the property under the decree of a court of equity, the wife's right of dower is completely extinguished." And see *Thorn v. Ingram*, 25 Ark. 52; *Crane v. Palmer*, 8 Blackf. 120; *Nazareth Literary and Benevolent Institution v. Lowe*, 1 B. Mon. 257; *Ellicott v. Welch*, 2 Bland. Ch. 242; *Kirby v. Dalton*, 1 Dev. Eq. 195; *Williams v. Woods*, 1 Humph. 408; *Walton v. Hargraves*, 42 Miss. 18; *Cocke v. Bailey*, Id. 8; *Tisdale v. Risk*, 7 Bush. 139; *Harrison v. Griffith*, 4 Id. 147; *Crumb v. Davis*, 54 Iowa 22; but the lien, while unenforced, will not reduce the amount of dower receivable by the widow; *Flinn v. Barber*, 64 Ala. 193; *Boynnton v. Sawyer*, 35 Id. 497; it is only superior to the widow's dower, it does not destroy it, and when enforced after her husband's death, the widow will be entitled to one-third of the rents from her husband's death to the time of the enforcement, *Wilson v. Ewing*; Court of Appeals of Kentucky, 1881, 13 Reporter 272.

Where Vendor's Lien is Upheld.

The lien exists only where its object is money, and where the vendor relies on it and not on other security; thus where the consideration of a deed was support, the lien was not upheld as against the dower of the grantee's widow, *Meigs v. Dimock*, 6 Conn. 458; it is lost by taking any independent security, *Hollis v. Hollis*, 4 Baxt. 524.

Where a vendor takes a note, bill, or bond for the price of the land, with distinct security, he waives his lien, and the vendee's widow may have dower, although the price be unpaid, *Blair v. Thompson*, 11 Gratt. 441; and it has been even held, when the purchaser gave notes for the price to the vendor's creditor, that there remained no lien paramount to dower, *McClure v. Harris*, 12 B. Mon. 264.

In *Clements v. Bostwick*, 38 Ga. 1, the Court refused to enforce a vendor's lien, as against dower, where the vendor had parted with the legal title by conveying it to the vendee; but the better opinion appears to be that the lien may be upheld as superior to dower, even where the vendor has given up the legal title and taken notes for the price, if he has done nothing else to waive his right, *Brooks v. Woods*, 40 Ala. 538; *Warner v. Van Alstyne*, 3 Paige 513; *Bisland v. Hewett*, 11 Sm. & M. 164; *Firestone v. Firestone*,

2 Ohio St. 415; and in a case where notes were given for the price, and, remaining unpaid, the vendee reconveyed the land to the vendor, who returned the notes, it was held that no right of dower had vested in the vendee's wife, *Huginin v. Cochrane*, 51 Ill. 302.

The lien is lost by taking a deed of trust to secure the notes for the purchase-money. Thus in *Gregg v. Jones*, 5 Heisk. 443, the vendee having died before the deed of trust given by him had been enforced, it was held that the widow's dower was superior to the vendor's claim. NICHOLSON, C. J., said: "The vendor once had the right to assert the superiority of his lien to the widow's right of dower, but he elected to make a contract by which he ceased to rely on the vendor's lien, and chose to rely on his trust deed. By the provisions of the statute he brought his debt under the operation of the express provisions of the statute, and it is not in our power to restore him to his rights as vendor."

The vendor's lien once satisfied, it cannot be kept alive, so as to prejudice dower in favor of any other debt, though due to the same person who is the vendor. Thus in *James v. Fields*, 5 Heisk. 394, the notes given for purchase-money were all paid, but the vendor made a loan to the vendee, and it was agreed that the vendor should hold the legal title as security therefor, it was held that the lien given by the agreement, though good as against creditors, would not avail its holder as against the dower-right of the vendee's widow, the purchase-money lien having been extinguished by the payment of the notes.

When the vendor files his bill to enforce his lien, the widow may set up her dower, for she has a right to an account, for after the lien is discharged she will have a right to dower in the surplus, *Brooks v. Woods*, 40 Ala. 538; and it has been held that a wife may, under such circumstances, assert her inchoate interest, *Unger v. Leiter*, 32 Ohio St. 210; after the husband's death, the wife's dower is not divested by a suit to enforce the vendor's lien, unless she be made a party to the proceedings, *Willet v. Beatty*, 12 B. Mon. 172.

Charge of Legacies on Devised Lands no Bar to Dower therein.

Dower is not barred in devised lands, by the fact that they have been charged with legacies, and although the legatee proceeds and obtains a judgment against the devisee, the latter's wife will be entitled to her dower, *Lloyd v. Conover*, 1 Dutch. 47; and where a specific devise of realty is made, the devisee will not be entitled to exoneration against the dower of the devisor's widow, unless there is an express direction to that effect in the will, *Drummond v. Drummond*, 40 Me. 35.

Dower Superior to Rights of Creditors.

Dower is superior to the rights of creditors, *Yandell v. Pugh*, 53 Miss. 296, even in States where the right of dower is confined to lands of which the husband dies seized, *Combs v. Young*, 4 Yerg. 218; *Stokes v. O'Fallon*, 2 Mo. 29; *Bray v. Lamb*, 2 Dev. Eq. 372; and the case is not altered by the fact that the husband is insolvent at the time of his death, *Crittenden v. Johnson*, 11 Ark. 94; *Crittenden v. Woodruff*, Id. 82. The rule is otherwise in Pennsylvania, and at one time was so in Missouri; and, in case of insolvency, in Mississippi, *Bridgeforth v. Maxwell*, 42 Miss. 743; but debts can be set up as against dower by the creditor only, *Thomas v. Hesse*, 34 Mo. 13.

Sale by Order of Probate Court for Debts of Husband.

Where lands are sold by a probate court for the debts of the husband, the wife's dower will not be barred, *Owen v. Slatter*, 26 Ala. 547; *Livingston v. Cochran*, 33 Ark. 294; and see *Floyd v. Hodge*, 10 Rich. 157; and that, although the widow was made a party to the proceedings and did not answer, *Merriwether v. Sebree*, 2 Bush. 232; although in such case an innocent purchaser will be protected, and the widow, as against him, confined to a claim against the proceeds, Id.

It has been held that such a sale will not be a bar, although made on the petition of the widow as administratrix, *Owen v. Slatter, supra*; but in *Stoney v. Bank of Charleston*, 1 Rich. Eq. 275, where the executrix, who was also the widow, filed a petition for the sale and made no claim of dower, she was held barred. But while the widow cannot be barred by a sale against her will, she may bar herself by concurring therein, and receiving a portion of the proceeds in lieu of dower, *Ellis v. Diddy*, 1 Ind. 561.

For statutory provisions, whereby a decedent's land may be sold by order of Court, free of dower, and the widow's interest properly appraised and secured, see Maryland, Rev. Code 1878, Tit. XXVI., Art. 65, §§ 106, 108, p. 651; Connecticut, Gen. Stats. (1875), Tit. 18, Ch. 11, Art. IV., § 39, p. 394; Alabama, Code, Pt. 2, Tit. 4, Ch. 7, Art. 1, § 2469.

Defeat of Dower in Defeasible or Conditional Estate.

Where the husband holds an estate determinable upon the happening of a certain event, or upon condition, if the estate is defeated by the happening of the event, or there is a breach of condition and the grantor enters therefor, in either case the widow's dower will be defeated, *Northcut v. Whipp*, 12 B. Mon. 65; *Beardslee v. Beardslee*, 5 Barb. 324; the same is

in the case of an estate upon a conditional limitation, *Northeast v. Whipp*, *supra*.

Bar of Dower where Estate is Determined by an Executory Devise.

But it is held that the determination of an estate by an executory devise will not defeat dower, *Jones v. Hughes*, 27 Gratt. 561; *Medley v. Medley*, Id. 568; *Milledge v. Lamar*, 4 Desau. 617; *Evans v. Evans*, 29 Pa. St. 277; but, on the contrary, it was held, in *Edwards v. Bibb*, 54 Ala. 475, that in the case of an executory devise on definite failure of issue, on such failure dower would be divested. This case rested on *Adams v. Beekman*, 1 Paige 631, and *Weller v. Weller*, 28 Barb. 589; the latter case was a decision of but one judge of a court not of last resort, and in view of the opinion of the Court of Appeals of New York in *Hatfield v. Sneden*, 54 N. Y. 280, would seem to be of questionable authority.

Bar by Execution of Power by Husband.

Where the husband is the owner of a power of disposition, and until the execution of the power, the property is given to him in fee, he may, by executing the power, bar his wife's dower; but the barring must be by a paper showing an intent to execute the power; therefore, where a husband devises the property of which he is so possessed to a third person without alluding to the power, the widow will have her dower in the land devised, *Link v. Edmondson*, 19 Mo. 487; and the mere existence of the power will have no effect upon the right of dower; accordingly, where land was conveyed to C. in trust for P. for life, and subject to a power of disposition in P., and the latter died without having made an appointment, it was held that he took a fee, and that his wife should have dower, *Peay v. Peay*, 2 Rich. Eq. 409.

Bar of Dower by Act to which Wife is Actually or Constructively a Party—Jointure.

So far we have considered, principally, the cases in which the widow was barred by matters within the control of third persons, and not by act of her own, except incidentally. We come now to consider those means of barring dower to which the wife is either actually or constructively a party; and first as to jointure.

Jointure is thus defined by Bouvier, Law Dict. *ad verbum*: A competent livelihood of freehold for the wife of lands and tenements, to take effect in

possession presently after the death of the husband, for the life of the wife at least.

In Littleton's time the jointure was no bar to dower, and therein was distinguished from dower *ad ostium ecclesie* and *ex assensu patris*, but by the statute of 27 Hen. 8, c. 10, § 6, it was enacted that a jointure should be so far a bar to dower that the widow should not have both jointure and dower, Co. Lit. 36 b; *Vincent v. Spooner*, 2 Cush. 467. The characteristics of a good jointure, by virtue of the statute, were: 1. That it should take effect in possession or profit immediately upon the death of the husband. 2. That it should be an estate of freehold for the life of the widow or a greater estate. 3. That it should be made to the widow herself. 4. That it should be made in satisfaction of the whole dower to which the widow would otherwise be entitled. 5. That it should be so expressed or averred. 6. In case of a jointure made after marriage, the widow could waive it and claim her dower.

This statute, and the requirements of it, have been recognized in the United States, *Gelzer v. Gelzer*, 1 Bail. Eq. 387; *Vance v. Vance*, 21 Me. 364; *Avant v. Robertson*, 2 McM. 215; *Yancy v. Smith*, 2 Metc. (Ky.) 408; *Tevis's Exrs. v. McCreary*, 3 Id. 151; *Grider v. Eubanks*, 12 Bush. 510; Report of the Judges, 3 Binn. (App.) 619; *Hawley v. James*, 5 Paige 318.

In Alabama, it is held that the statute was never in force, *Gould v. Womack*, 2 Ala. 83, and that a post-nuptial jointure, to be of effect, must be accepted after the husband's death, *Martin's Heirs v. Martin*, 22 Ala. 86.

A deed made after marriage will not be held to create a jointure in the absence of an express declaration to that effect, or some act equivalent in effect to a declaration, as a delivery on condition that, if the deed be received and retained, it shall be in lieu of dower, *Bubier v. Roberts*, 49 Me. 460; *Reed v. Dickerman*, 12 Pick. 148.

Jointure lands need not be free from incumbrance, *Ambler v. Norton*, 4 H. & M. 23.

Bar to Dower by Ante-Nuptial Agreement.

A provision which fails in the requirements of a legal jointure, and, therefore, cannot take effect as such, may, nevertheless, be of such a character that a court of equity will compel the widow to elect between it and her dower, *Logan v. Phillips*, 18 Mo. 22; and thus arises a sort of equitable jointure, which, although not enforceable at law, *Gardner v. Gardner*, 10 R. I. 211, will yet be upheld in equity, *Gelzer v. Gelzer*, 1 Bail. Eq. 387, which leads to the ante-nuptial agreement as a bar to dower. Such an agreement

is not bound by the same rules as a legal jointure, and it has been held that "almost any *bona fide* and reasonable agreement made before marriage, to secure the wife in the enjoyment of a competent estate or support during her life, will be upheld as a good ante-nuptial agreement;" and in *Andrews v. Andrews*, 8 Conn. 79, it is said that "any provision which a person, able to contract, agrees to accept before marriage, will be a good equitable bar to dower;" and see *Gibbon v. Gibbon*, 40 Ga. 562; *Heald's Petition*, 22 N. H. 265; *Selleck v. Selleck*, 8 Conn. 85, note.

The provision must be fair and reasonable, *Gould's Exr. v. Womack*, 2 Ala. 83; *Grogan v. Garrison*, 27 Ohio St. 50; *McCartee v. Teller*, 2 Paige 511, and must commence immediately upon the husband's death, *McCartee v. Teller*, *supra*.

As a rule, it may be said that where the agreement is simply that the wife shall have control of her own property, with power to dispose of it by will, such an agreement will not be upheld as a bar to dower, *Swaine v. Perine*, 5 Johns. Ch. 482; *Whitehead v. Middleton*, 2 How. (Miss.) 692; *Blackmon v. Blackmon*, 16 Ala. 633; *Adams v. Adams*, 39 Id. 274; but it is held otherwise in *Cauley v. Lawson*, 5 Jones Eq. 132; *Stilley v. Folger*, 14 Ohio 610; *Andrews v. Andrews*, 8 Conn. 79; and see *Wentworth v. Wentworth*, 69 Me. 247.

In *Culberson v. Culberson*, 37 Ga. 296, the agreement was that the wife, in lieu of dower, should have control of her property to her sole and separate use, and that the husband's estate should be chargeable with furnishing the wife, in case she survived her husband, with a house, lot, and three thousand dollars. It was held that there was a good equitable bar provided in the agreement.

In *McGee v. McGee*, 91 Ill. 548, both parties owned property, real and personal, and, by the contract, the husband relinquished all rights which, by the marriage, he would have acquired over his wife's property, and in consideration thereof she relinquished dower; the agreement was upheld as a good bar.

The provision by ante-nuptial contract to bar dower may consist of either realty or personalty, *Tewis's Exrs. v. McCreary*, 3 Metc. (Ky.) 151; *Farrow v. Farrow*, 1 Del. Ch. 457; it may be of a sum of money, *Findley's Exrs. v. Findley*, 11 Gratt. 434; but a gift of money, to be a good bar, must be designed and accepted as an equivalent for dower, *O'Brien v. Elliot*, 15 Me. 125.

In *Hastings v. Dickinson*, 7 Mass. 153, it was held that an annuity was no bar, although the widow had covenanted not to demand dower; and to the same effect see *Gibson v. Gibson*, 15 Mass. 106.

The agreement is within the Statute of Frauds as touching realty, and,

therefore, a verbal agreement, that in consideration of certain things to be given to the wife by the husband she will not claim dower, is no bar to a claim of dower, and the marriage, in the absence of actual fraud, will not be regarded as such partial performance of the contract as will take the case out of the operation of the statute, *Finch v. Finch*, 10 Ohio St. 501.

A mere agreement not to claim dower has been held to be against public policy, and hence unavailing against the widow, *Curry v. Curry*, 17 N. Y. S. C. 367. In *Wentworth v. Wentworth*, 69 Me. 247, however, it was held that the consideration of marriage was, *per se*, sufficient to support an agreement in bar of dower; but even if the position taken in this case be sound, it would seem that the consideration of marriage must embrace the support and companionship which generally follow its solemnization. In *Spiva v. Jeter*, 9 Rich. Eq. 434, there was an ante-nuptial agreement that the wife should have no dower. After the marriage the husband deserted his wife; it was held that she was not barred of her dower even as against a purchaser of the husband's land.

The mere agreement, no matter how effectual a bar it provides for, is of no avail without performance, and will not deprive the widow of her dower, and compel her to claim against her husband's estate simply as a creditor, or by virtue of her contract, *Johnson v. Johnson's Admr.*, 23 Mo. 561; *Brenner v. Gauch*, 85 Ill. 368; *Sheldon v. Bliss*, 8 N. Y. 31; but on a failure to perform, her right of dower revives, *Sargent v. Roberts*, 34 Me. 135; but it is also held that in such case the widow must rescind the contract, for if she accept a *pro rata* share of her husband's estate with creditors or others, she will be barred, *Camden Mutual Ins. Asso. v. Jones*, 23 N. J. Eq. 171.

To bar dower, the performance of the contract must be strict, or at least substantial. In *Sheldon v. Bliss*, *supra*, the contract was to leave the widow an annuity during life, and the annuity left was *durante viduitate* only, it was held that there was no bar, and that the widow could claim her dower. *Vincent v. Spooner*, 2 Cush. 467, seems to be contrary to the general current upon the subject of the necessity of performance to constitute a bar; but as it was decided upon the Massachusetts statute, Rev. St. c. 60, §§ 8, 9, it can hardly disturb outside decisions. In that case the intending husband covenanted to secure to a trustee for his wife, by will or otherwise, a certain annual sum during widowhood; he died leaving a will which did not make the provision covenanted, but which contained a general direction that his debts should be paid and his obligations fulfilled. The executor stated his willingness to pay the annual sum. The Court held that the ante-nuptial contract itself was a complete provision within the statute, and that the dower was barred.

In *Freeland v. Freeland*, 128 Mass. 509, the contract was that both husband and wife should retain their respective estates, and those which might accrue afterwards to them, separate and apart from each other, with full power of disposition, "provided, that in case of the death of F. [the husband], she, the said Mary [the wife], surviving him, there shall, within one year from the time of his decease, be paid to the said Mary the sum of \$1500, as a proper debt of his estate." Covenants to pay the said \$1500, and, on the part of the wife, to release all claims on the husband's estate, were added. The \$1500 were never paid. The Court, without going to the full extent of *Vincent v. Spooner*, held that the widow was not entitled to claim dower, SOULE, J., saying: "The fact that this agreement for \$1500 is not the only stipulation in consideration of which the demandant agreed to release her dower, but is merely one of several agreements which, together, make up the marriage contract, takes the case out of the doctrine which governs where the agreement is to accept a mere pecuniary provision instead of dower."

Where the ante-nuptial contract is to provide sufficiently by will for the wife, the husband is not the sole judge of what constitutes sufficiency, and if he make provision for an insufficient maintenance only, a court of equity will increase the amount of the provision, *Rivers v. Rivers*, 3 Desau. 190; and this it may do at the expense of voluntary grantees of the land of the husband or his heirs; thus in *Garrard v. Garrard*, 7 Bush. 436, the ante-nuptial contract was that the husband should give to his wife a sufficient support during widowhood. At the time of his marriage he owned a considerable amount of land; during the coverture he conveyed all his land, without other consideration than that inferable from relationship, to his children, and died insolvent, without making provision for his widow. The Court charged the lands of the children with annuity in favor of the widow.

An ante-nuptial contract will not be extended by implication so as to bar dower in lands acquired after the date of the contract, where the intent of the husband to bar dower, as dower in the whole of the property of which he may be seized during the coverture, does not appear. Thus in *Arrington v. Arrington's Heirs*, 2 Car. Law Repos. 253, the husband and wife, before marriage, and in contemplation thereof, conveyed, by a deed, to a trustee all the husband's lands, and all that he might thereafter acquire in trust, that the husband might hold the same during life, and sell or appoint the same by will, with a remainder, in case of intestacy, to the use of the husband's children. The deed contained no covenant on the part of the widow, nor was it expressed to be in satisfaction of dower. The Court held that the deed could only operate upon such lands as the husband

owned at the time of its execution, and did not bar the widow's dower in after acquired property.

Any fraud in the ante-nuptial contract will avoid it, and the widow may then claim dower; thus in *Farrow v. Farrow*, 1 Del. Ch. 457, the intending wife agreed to take one-third of the personalty of the husband in lieu of dower; at the time the husband was in debt beyond the value of the personalty, and concealed the fact; it was held that the wife could have her dower.

An infant will not be held bound by an ante-nuptial contract; thus in *Shaw v. Boyd*, 5 S. & R. 309, an infant, with the assent of her parent and guardian, and in contemplation of marriage, gave her bond to release dower in consideration of five hundred dollars, to be paid to her after her husband's death. The husband died, and the widow, still a minor, received the five hundred dollars, and executed a release of dower. The Court recognized the English rule to be that a settlement of personalty upon an infant might act as a bar, but held, without considering the general question, that the case showed no settlement, but the mere naked contract of an infant, by which she was not bound.

In *Levering v. Heighe*, 3 Md. Ch. 365, it was held that an infant could bar her dower by an ante-nuptial contract. The Chancellor relied on the cases of *Drury v. Drury*, 2 Eden 39, and *McCartee v. Teller*, 2 Paige 511, as supporting his position. It may, however, be noted, that the remarks which the learned Chancellor relied upon in the cases cited by him, were mere dicta, the question in the first-named case being whether a female infant could so settle her realty as to bind her; and in *McCartee v. Teller*, all that WALWORTH, Ch., said was that "an equitable jointure, or a competent and certain provision for the wife in lieu of dower, if assented to by the infant and her father or guardian before marriage, and to which there is no objection but its equitable quality, would bar dower."

Where a marriage contract is alleged, its existence and whole contents must be strictly proved, *Gangwere's Estate*, 14 Pa. St. 417.

Settlement during Coverture Accepted after Husband's Death.

A settlement may be made during coverture as a bar to dower, but it must be voluntarily accepted by the widow, after her husband's death, in order to be binding, *McCartee v. Teller*, 2 Paige 511.

A mere gift to the wife, or a settlement upon her during coverture, will not be regarded as in lieu of dower unless so expressed. This was decided in *Mitchell v. Wood*, 60 Ga. 525, in which the husband, in contemplation of death, had made a gift to his wife, which he declared, in writing, to be in part provision for her, but said nothing about dower as such.

Acceptance of a homestead by the wife during coverture will not be a bar to her dower, *McAfee v. Bettis*, 72 N. C. 28.

Widow Deprived of Provision Entitled to Dower or Indemnity.

The widow, if deprived of her provision through no fault of her own, may have dower or indemnity, *Teviss's Exrs. v. McCreary*, *supra*; *Grider v. Eubanks*, 12 Bush. 510; but her dower right will not be revived by the subsequent deterioration of property which she has taken in lieu thereof; thus in *Lively v. Paschal*, 35 Ga. 218, the widow had, by a post-nuptial settlement made at her desire, received, in lieu of dower, certain negroes. The husband died in 1858, and the widow held the slaves, whose value was great, until after their emancipation by the Federal power. After this event the widow tried to have the contract set aside, but her application was refused.

Statutory Regulation of Jointures and Settlements in Lieu of Dower.

The subject of jointures and ante-nuptial and post-nuptial contracts has been the subject of statutory regulation in many of the States, as follows:

Arkansas.—A jointure in land before marriage with the assent of the intended wife, Rev. St., Ch. XLIX., § 2218, or a pecuniary ante-nuptial provision likewise assented to, § 2220, will bar dower. The wife's assent is to be shown by her becoming a party to the marriage settlement; if she is an infant, the assent may be given for her by her guardian, § 2219. If a jointure is made after marriage, or if without the assent of the wife, either a jointure or pecuniary provision is made before marriage, the widow may elect between her dower and the provision, § 2221; and unless within one year she enter upon land for dower, or otherwise proceed to obtain the same, she is to be regarded as having elected the provision, § 2223.

Connecticut.—Any settlement before marriage, to take effect on the death of the husband, and to be in lieu of dower, is a bar, unless it fails in whole or in part, in which case the widow will be entitled to dower in the estate, or in so much thereof as will recompense her for her loss, not exceeding the value of her dower, Gen. St., Rev. 1875, Tit. 18, Ch. 11, Art. IV., § 4.

Delaware.—Jointure is made a bar, and there is the same provision as to recompense as that above stated, Laws, Ch. LXXXVII., §§ 3, 4.

Georgia.—A provision before marriage, and accepted by the wife in lieu of dower, will be a bar, Code (1873), Pt. 2, Tit. 2, Ch. 1, Art. 2, § 1764.

Illinois.—Dower is barred by a jointure in land, Rev. St., Ch. 41, § 7,

assented to before marriage by the intending wife, or, in case of her infancy, by her father or guardian, § 8; in case of no assent, or if a provision is made after marriage, the widow may elect between the provision and dower, § 9.

Kentucky.—Jointure may be of either realty or personalty, and if made before marriage, without the wife's consent, or during her infancy, or after marriage, the widow may waive the jointure, and claim dower within twelve months after the husband's death, Gen. St., Ch. 52, Art. IV., § 6, p. 530.

Maine.—Dower is barred by a jointure in land, Rev. St. (1871), Tit. IX., Ch. 103, § 7, p. 757, of at least a freehold for life, taking effect immediately on the husband's death, and assented to by the intended wife, the assent being shown by her becoming a party to the settlement, and if within age, being joined in the deed, by her father or guardian. If made without her assent, the jointure may be waived by the widow within six months after the husband's death, § 9.

Massachusetts.—The law is the same as in Maine, as above stated, Rev. St. (1882), Ch. 124, §§ 7, 9, p. 741, and dower may also be barred by a pecuniary provision, subject to the same terms as a jointure, § 8.

Missouri.—Jointure may be of realty or personalty, if it constitutes a provision for support during the life of the widow, and is expressed to be in bar of dower, or if lands are conveyed during coverture to the wife for the same purpose, by another person, in either case the dower will be barred, Rev. St., Vol. 1, Ch. 29, § 2201; if the provision is made after marriage, or during the infancy of the intended wife, she may elect between dower and the provision, § 2202.

New York.—The wife's dower is barred by a jointure, provided it be a freehold for the life of the wife, at least, to take effect immediately upon the husband's death, in possession or profit, Rev. St. (1882), Pt. 2, Ch. 1, Tit. 3, § 9, assented to by the wife joining in the deed, or, if an infant, by her father or guardian joining, § 10; or by a pecuniary provision, § 11. If without assent, or made after marriage, the wife may elect between the provision and dower, § 12.

The law is the same in *Michigan*, Comp. Laws, Vol. 2, Tit. XXII., Ch. CLI., §§ 4282, 4285; *Wisconsin*, Rev. St., Pt. 2, Tit. 20, Ch. 98, §§ 2167–2170; *Nebraska*, Comp. St., Pt. 1, Ch. 23, § 13–16; *Oregon*, Ch. 17, Tit. 1, §§ 14–17.

New Jersey.—A jointure will bar dower, Revision of 1877, p. 322, pl. 10, and if made after marriage, or during the infancy of the wife, she may elect between it and her dower, Id., pl. 12, 13.

The law is the same in *Ohio*, Rev. St. (1880), Vol. 1, Pt. 2, Tit. IV., Ch. 3, § 4189.

Rhode Island.—A provision for the life of the widow, to take effect immediately after the husband's death, is a bar to dower,; but if made after the marriage, or during the infancy of the wife, she may waive it after the husband's death, St., Tit. 29, Ch. 229, § 23, p. 640.

South Carolina.—A jointure will be a bar, but, if made after marriage, the widow may waive it and take dower, Stats., Ch. 83, §§ 12, 15.

Maryland.—Any estate given by jointure, or other settlement, before marriage, is a good bar to dower, Rev. Code, Art. 50, Tit. 24, § 226.

Virginia.—Dower is barred by a provision by way of jointure; if it is made after marriage, or during the infancy of the wife, she may waive it, Code, Tit. 31, Ch. 106, §§ 4, 5.

The law is the same in *West Virginia*, Rev. St., Ch. 70, §§ 4, 5.

New Hampshire.—Dower may be barred by an ante-nuptial settlement, Gen. St. (1878), Ch. 202, § 11.

Vermont.—Dower is barred by a jointure, settled by the husband or other person, or a pecuniary provision, before marriage, with or without the consent of the wife, which will take effect immediately after the death of the husband, and is expressed to be in lieu of dower, Rev. Laws (1880), Tit. 18, Ch. 114, § 2219; the wife is permitted to waive the provision within eight months from the proof of the husband's will, or a grant of letters of administration.

In case of lawful eviction of the widow from her jointure or provision, it is expressly provided in many States that she shall be recompensed either by an endowment, or by an indemnity from her husband's lands or estate, to the extent of what would have been her dower; see Maine, Rev. St., Tit. 1, Ch. 90, § 16, p. 470; Vermont, Sts., Tit. 15, Ch. 114, § 2225; Massachusetts, Sts. (1882), Ch. 124, § 15; New Jersey, Rev. of 1877, p. 322, pl. 10; Delaware, Laws, Ch. LXXXVIII., § 4; Connecticut, Gen. St. (Rev. 1875), Tit. 18, Ch. 11, Art. IV., § 4; Kentucky, Gen. St., Ch. 52, Art. IV., § 7, p. 530; Virginia, Code, Tit. 31, Ch. 106, § 6, p. 854; West Virginia, Rev. St. (1879), Ch. 70, § 8, p. 500; Michigan, Comp. Laws, Vol. 2, Tit. 22, Ch. 151, § 4288, p. 1362; Nebraska, Comp. St., Pt. 1, Ch. 23, § 19; Oregon, Ch. 17, Tit. 1, § 20; Ohio, Rev. St. (1880), Vol. 1, Pt. 2, Tit. IV., §§ 4190, 4191; Rhode Island, Pub. Sts. (1882), Tit. 29, Ch. 229, §§ 24, 25, p. 640; South Carolina, Sts., Ch. 83, § 14, p. 432; Wisconsin, Rev. St., Pt. 2, Tit. 20, Ch. 98, § 2173.

A peculiarity of a jointure, under the law as received by us from England, is that it is not forfeited, as is dower, by the misconduct of the wife, *Sidney v. Sidney*, 3 P. Wms. 269; *Tower v. Davys*, 1 Vern. 479. This peculiarity has been, in some States, taken away by enactments, to the effect that jointure shall be forfeited in all cases where dower would be,

New York, Rev. St. (1882), Pt. 2, Ch. 1, Tit. III., § 15, p. 2198; Arkansas, Sts., Ch. XLIX., § 2224.

Bar of Dower by Devise or Bequest Accepted by Widow.

A bar to dower may be created by a devise or bequest to the widow in the husband's will, intended to be in lieu of dower, and accepted by the widow, *McDowall v. McDowall*, 1 Bail. Eq. 324; *Kennedy v. Mills*, 13 Wend. 553.

It sometimes becomes a question, as to whether a provision is intended to be in lieu of dower, or as a free gift to the widow.

In the absence of any statutory provisions upon the subject, it is generally held that the intent to bar dower must be plain, and that if there is doubt with reference thereto, the widow will be favored, *Clark v. Griffith*, 4 Iowa 405; *Higginbotham v. Cornwell*, 8 Gratt. 83; *Smith v. Kniskern*, 4 Johns. Ch. 9; *Sandford v. Jackson*, 10 Paige 266; *Whilden v. Whilden*, Riley, Ch. 205; *Douglas v. Feay*, 1 W. Va. 26; *Kelly v. Stinson*, 8 Blackf. 387; *Ostrander v. Spickhard*, Id. 227; *Exrs. of Green v. Green*, 7 Port. 19; *Stark v. Hunton*, Saxt. 216; *Cunningham v. Shannon*, 4 Rich Eq. 135; *McLeod v. McDonnell*, 6 Ala. 236; *Alling v. Chatfield*, 42 Conn. 276; *Gordon v. Stevens*, 2 Hill Ch. 46.

It is even held in some cases, that to cause a devise or bequest to have the effect of being in lieu of dower, it must be so expressed in the will, *Perry v. Perryman*, 19 Mo. 469; *Bryant v. McCune*, 49 Id. 546; *Pickett v. Peay*, 2 Const. Rep. (1 Series) 746; S. C. 3 Brev. 545; *Blunt v. Gee*, 5 Call 481; *Booth v. Stebbins*, 47 Miss. 161 (but see contra, *Wilson v. Cox*, 49 Id. 538); *Wood v. Lee*, 5 T. B. Mon. 50; *Mills v. Mills*, 28 Barb. 454; *Sheldon v. Bliss*, 8 N. Y. 31; but the strong expression of GARDNER, J., in the last cited case, seems hardly supported by the authorities in his State; and, so far as this point is concerned, this case, and those which follow it, would seem to be of no weight since the decision in *Tobias v. Ketchum*, 32 N. Y. 319. In some cases it has been held that any provision will put the widow to her election, *Reid v. Campbell*, Meigs 378; *Craven v. Craven*, 2 Dev. Eq. 338.

The better opinion seems to be that the widow may be compelled to elect between the provision in the will and her dower, by a strong and necessary implication, as by the devise being in itself inconsistent with the right of dower, *McCullough v. Allen*, 3 Yeates 10, which follows in the line of *Kennedy v. Nedrow*, 1 Dallas 415, where McKEAN, C. J., laid down the following as the circumstances under which equity would put the widow to an election: "1st. Where the implication that she shall not have the devise

and the dower is *strong* and *necessary*; 2dly. Where the devise is *entirely inconsistent* with the claim of dower; and 3dly. Where it would prevent the *whole will* from taking effect; that is, where the claim of dower would overturn the will *in toto*."

The rule, as laid down in *Tobias v. Ketchum*, 32 N. Y. 319 (reversing S. C. 36 Barb. 304), is that a provision in a will will not be held to be intended in lieu of dower, unless the bequest is so repugnant to the claim of dower that the two cannot stand together; and see *Lewis v. Smith*, 9 N. Y. 502; *Bull v. Church*, 5 Hill (N. Y.) 206, 2 Denio 430; *Jackson v. Churchill*, 7 Cow. 287; *Savage v. Burnham*, 17 N. Y. 562; *Lasher v. Lasher*, 13 Barb. 106; *Toroke v. Hardeman*, 7 Ga. 20; *Fuller v. Yates*, 8 Paige 325; *Adsit v. Adsit*, 2 Johns. Ch. 448; *Sample v. Sample*, 2 Yeates 389, 483; *Havens v. Havens*, 1 Sand. Ch. 324; *Sandford v. Jackson*, 10 Paige 266; *Corriell v. Ham*, 2 Iowa 552; *Stewart v. Stewart*, 31 N. J. Eq. 398; *Cain v. Cain*, 23 Iowa 31; but no election will be caused when the provision and dower can take effect together, *Herbert v. Wren*, 7 Cr. 370.

The fact that the devise is of a larger estate than the dower, will not raise the implication of a bar, *Evans v. Webb*, 1 Yeates 424; and where the provision, by will, *includes* dower, it is tantamount to a gift in addition to dower, and the widow can, therefore, hold the dower freed from claims against the husband's estate, *Baxter v. Bowyer*, 19 Ohio St. 490.

In *Wood v. Wood*, 5 Paige 596, it was held that the widow was not put to her election by a direction that all the testator's estate should be sold, and one-third of the proceeds be invested for the use of the widow during widowhood,—WALWORTH, Ch., saying: "I am satisfied, however, from an examination of the American as well as the English cases, that a devise of all the testator's real and personal estate to trustees, to be converted into money, without any particular designation of the real property to be sold, and giving to the wife an annuity, or other provision, out of such mixed fund, is not of itself sufficient to show that the testator intended that her interest in the land, as tenant in dower, should be sold as part of the estate, so as to make it necessary for the widow to elect between such dower and the provision contained in the will."

Upon the same principle see *Chandler v. Woodward*, 3 Harring. 428; *Kinsey v. Woodward*, Id. 459; and in *Gordon v. Stevens*, 2 Hill Ch. 46, it is held that a direction to executors to sell, and a devise to the wife of all the land received through her, would not cause an election.

It has, however, been held that a direction to sell the realty is inconsistent with dower, and will put the widow to an election, *Vernon v. Vernon*, 53 N. Y. 351; *Brink v. Layton*, 2 Redf. 79; and so a devise to executors to sell at their discretion, and invest one-half the proceeds for the benefit

of the wife during life, *Colgate v. Colgate*, 23 N. J. Eq. 372; but a mere devise of the real estate to trustees, to pay over the income, or a portion thereof, to the widow, will not have that effect, *Van Arsdale v. Van Arsdale*, 2 Dutch. 404; *Colgate v. Colgate*, *supra*.

If the will, containing a provision for the wife, creates a trust of the land, and vests the entire legal estate in trustees, with active duties, there is such a repugnance between the provisions of the will and dower as will cause an election, *Tobias v. Ketchum*, 32 N. Y. 319.

A direction that the whole estate should be kept together for a year, and applied to debts, and then, after specific bequests, including some to the wife, had been paid, be kept together until the eldest child attained his majority, and then be divided, will not be a devise in bar of dower, *Brown v. Caldwell*, Speers Eq. 322.

In *Worthen v. Pearson*, 33 Ga. 385, it was held that when the testator devises the whole of two properties, if there be one part of the property as to which it is clear, that the testator did not intend it should be subject to the claim of dower, it follows that he did not intend that any portion of it should be subject to dower, and in such case the wife is put to her election.

A devise to the testator's sons, coupled with a direction to support their mother, is not inconsistent with the right of dower in the latter, *Jackson ex d. Loucks v. Churchhill*, 7 Cow. 287; nor is a devise, with a provision that the widow shall have her support therefrom, and live with the devisees, although the support is charged on the land devised, *Douglass v. Feay*, 1 W. Va. 26; or is a devise to the widow herself of the use of a room and a comfortable support, to be paid by the executors, *Smith v. Kniskern*, 4 Johns. Ch. 9.

A bequest of "all my property, real and personal," to the widow for life, will not, by itself, put her to an election, *Metteer v. Wiley*, 34 Iowa 214; and see *Lewis v. Smith*, 9 N. Y. 502; or a bequest of one-third the testator's realty and personalty, given at a time when the dower in Iowa was in fee, *Watrous v. Winn*, 37 Iowa 72.

A devise of an estate for years is not to be held as intended in bar of dower, *Wiseley v. Findlay*, 3 Rand 361; nor will a provision in personalty be presumed to be so intended, *Pemberton v. Pemberton*, 29 Mo. 408; *Fulton v. Fulton*, 30 Miss. 586.

A devise to a widow, to which is attached a condition that she educate the testator's children, will not show an intent that it is to be taken in lieu of dower, *Webb v. Evans*, 1 Binn. 565.

A widow may be put to an election by a devise *durante viduitate*, followed by a devise over on her marriage, *Luigart v. Ripley*, 19 Ohio St. 24; *Bailey v. Boyce*, 4 Strobb. Eq. 84; *Hamilton v. Buckwalter*, 2 Yeates 389; *Crea-*

craft v. Dille, 3 Id. 79, S. C. Addison 350; and although the devise over is that the property shall "go according to law," *Stark v. Hunton*, Saxt. 216; but see *contra Blunt v. Gee*, 5 Call 481; and in *McGuire v. Brown*, 41 Iowa 650, where there was a devise *durante viduitate*, and a provision that, in case of marriage of the widow, the property should "take the course designated by existing laws," it was held that on her remarriage the widow could have dower.

A declaration, in a will, that personalty is left to the wife to exclude her from any further "demands on my estate," coupled with a devise of the rest of the estate, real and personal, to the executors for disposition, will sufficiently manifest an intention to bar dower, *Norris v. Clark*, 2 Stockt. 51.

By statute, in some of the States, a presumption that the devise to, or provision for, the widow, in a will, is in lieu of dower, is raised by the mere devise or provision itself, unless it appear that the testator intended that his widow should have both bequest and dower. See Michigan, Comp. Laws, Vol. 2, Tit. XXII., Ch. CLI., § 4286; Wisconsin, Rev. St., Pt. 2, Tit. 20, Ch. 98, § 2171; Nebraska, Comp. St., Pt. 1, Ch. 23, § 17; New York, Rev. St. (1882), Pt. 2, Ch. 1, Tit. 3, § 13; Oregon, Ch. 17, Tit. 1, § 1; Ohio, Rev. St., Pt. 3, Tit. 2, Ch. 1, § 5963, p. 1433; Massachusetts, Gen. Sts., Ch. 127, § 20, p. 750 (St. 1783, c. 24, § 8); Illinois, Rev. St., Ch. 41, § 10; Maine, Rev. St. (1871), Tit. IX., Ch. 103, § 10; Pennsylvania, Rev. Dig., Vol. 1, p. 529, pl. 4, Act. 14, Apr. 1851, § 11; Arkansas, Rev. St., Ch. XLIX., §§ 2233, 2334; and see *Jones v. Hughes*, 27 Gratt. 560; *Hilliard v. Binford's Heirs*, 10 Ala. 977; *Hardy v. Scales*, 54 Wisc. 452.

In Missouri, Rev. St., Vol. 1, Ch. 29, § 2199, and New Jersey, Rev. of 1877, p. 322, pl. 16, the presumption of intention to bar dower is confined to cases in which the provision is of realty. Under the New Jersey act, it has been held that a devise of a room in a house will not raise the presumption, *White v. White*, 1 Harr. (N. J.) 202; and that the devise, to cause an election, must be to the widow herself, and not in trust for her, and of lands lying within the State, *Van Arsdale v. Van Arsdale*, 2 Dutch. 404; and see *Thompson v. Egbert*, 2 Harr. (N. J.) 459; and in a case not coming within the letter of the law, as to presumption, the old rule will prevail; thus in *Freeland v. Mandeville*, 28 N. Y. Eq. 559, the will empowered the executors to sell the realty and purchase a home, to be used by the widow and children until the youngest child came of age. RUNYON, Ch., quoting KINDERSLY, V. C., said: "It is not enough to say that, upon the whole will, it may be fairly inferred that the testator intended his widow should not have dower. In order to compel her to elect, the Court must be satisfied that there is a positive intent, either expressed or clearly implied, that she is to be excluded from dower, *Gibson v. Gibson*, 17 E. L. & E. 349.

"Nor were any of the provisions of the will dependent on the relinquishment of her dower. The land might have been sold subject to her dower. It was, in fact, sold on an arrangement for the relinquishment of it on compensation being made to her out of the purchase-money. The fact that she consented to the sale, and took her dower out of the purchase-money, was regarded by Lord ALVANLY, M. R., in *French v. Davies*, 2 Ves. jr. 572, as a complete answer to the objection that the widow's claim of dower would obstruct the sale."

In Maryland, the presumption is that the provision is in lieu of dower, but where the provision is mixed, the widow need only elect as between the realty devised to her and dower, Code, Tit. XXIV., Ch. 50, §§ 227, 230; see *Durham v. Rhodes*, 23 Md. 233; *Orrick v. Boehm*, 49 Id. 172.

In Georgia, the statute leaves the presumption in favor of the wife's right of dower, except where the provision is expressed to be in lieu of dower, or there is a manifest intent to that effect, Code (1873), Pt. 2, Tit. 2, Ch. 1, Art. 2, § 1764.

In those States where the presumption has been changed by statute, as above, the intention to give both dower and provision must appear, or the widow will be put to her election, *Hastings v. Clifford*, 32 Me. 132; *Delay v. Vinal*, 1 Met. 57; *Moore v. Steidel*, 1 Dis. 281; and where there was a devise to the wife of one part of the testator's estate, and that the other part should "be disposed of as the law directs," it was held that the presumption against dower was not so far overcome as to give it to the widow in the second portion, *Adams v. Adams*, 5 Met. 277.

Where the intention does not appear by the will, parole evidence, to show that the devise or provision was intended in lieu of dower, is inadmissible, *Hall v. Hall*, 8 Rich. 407. It is otherwise held in Virginia and Kentucky, *Bailey v. Duncan's Rep.*, 4 T. B. Mon. 256; *Herbert v. Wren*, 7 Cr. 370; *Dixon v. McCue*, 14 Gratt. 540; *Ambler v. Norton*, 4 H. & M. 23.

Acceptance of Provision Necessary—Election—How made.

The efficacy of all bars by will, depends upon their acceptance by the widow after the husband's death. Her election may be made by the method provided by statute, in which case the statutory method must be followed substantially; see *Walton's Est.*, 1 Tuck. 10; *Price v. Woodford*, 43 Mo. 247, or by matter *in pais*.

To render an election *in pais* binding, it must be made with full knowledge of the facts, and of the electress's right, *Anderson's Appeal*, 36 Pa. St. 476; *Bradford's v. Kents*, 43 Id. 474; *Milliken v. Welliver*, 37 Ohio St. 460, S. C. 13 Reporter 346; and, therefore, the widow is not bound to make her

election before the husband's estate is settled, *Hall v. Hall*, 2 McCord Ch. 269; or while a controversy is going on over the will regarding the realty, in which controversy the widow's rights are involved, *Church at Acquackanonk v. Exrs. of Ackerman*, Saxt. 40; and where she has made an election in ignorance of the condition of the estate, she may retract her election, unless her change of purpose will injure one who has, *bona fide*, acted upon her election, *Dabney v. Bailey*, 42 Ga. 521; *Macknet v. Macknet*, 29 N. J. Eq. 54; *Simonton v. Houston*, 78 N. C. 408; creditors of the husband will not have the right to object to the retraction of an election to take the provision, since they are in no worse position than if the husband had died intestate, *Simonton v. Houston*, 78 N. C. 408. She may also retract where her election has been in consideration of an undertaking by the heirs, which has not yet been fulfilled by them, *Richart v. Richart*, 30 Iowa 465. But where an election has been made in ignorance of the law only, the widow having full knowledge of the facts, it is binding, unless the ignorance has been occasioned by fraud, *Cauffman v. Cauffman*, 17 S. & R. 16; *Light v. Light*, 21 Pa. St. 407.

In *Kents v. Bradfords*, 43 Pa. St. 474, STRONG, J., laid down the following rule as to an election and a retraction thereof: "Nothing less than unequivocal acts will prove an election, and they must be acts done with the knowledge of the party's rights, as well as of the circumstances of the case. . . . When the question is, whether a widow has elected to take a devise or bequest under her husband's will, in lieu of dower at law, it is not sufficient to prove that she has been merely passive, or even that she has received the property given to her by the will, unless she knew the situation of her husband's estate and the relative values of the properties between which she was empowered to choose. All this must be conceded; and so even when a widow has the requisite knowledge, where an act done by her is equivocal, the intention with which the act was done is material to be considered. But a widow who, after having become acquainted with all that is necessary for her to know, in order to make a binding election, receives the gift conferred by her husband's will, and uses it as her own, is not at liberty to say she did not intend to relinquish dower. Her acts are inconsistent with any other intention. They are not equivocal. She has no right to the gift except as legatee or devisee, and her taking and using it is an admission that she chooses to take under the will. . . . There are, undoubtedly, decisions that a widow may elect dower even after she has claimed and received the legacy or devise made to her, but she may not receive and hold the benefits conferred by the will of her husband, after the extent of her rights has become known to her, and then retract her election."

In Ohio, it is even held that the probate judge should explain to the widow the provisions of the will and her rights, to the end that her election may be intelligent; the record of election need not, however, show that this was done, *Davis v. Davis*, 11 Ohio St. 386.

An election, made fairly and understandingly, is a bar to the claim of dower both at law and in equity, *Davison v. Davison*, 3 Green Law 235; *Heron v. Hoffner*, 3 Rawle 393; *Hamilton v. Buckwalter*, 2 Yeates 389.

An election *in pais* may be shown in various ways, as an election against dower, by the widow selling the land, or a distributive share devised to her, for an estate beyond her life, *Brown v. Cantrell*, 62 Ga. 257; or by entering upon and continuing for a long time in possession of the land devised to her in lieu of dower, *Caston v. Caston*, 2 Rich. Eq. 1; *Craig's Heirs v. Walthall et ux.*, 14 Gratt. 518; *Kents v. Bradfords*, *supra*; but the mere remaining in the mansion house, where it has been devised to the widow, will not show an election to take under the will, for her occupancy may be referred to her right of quarantine, *McCallister v. Brand's Heirs*, 11 B. Mon. 371.

Qualifying as executrix of the husband's will, will be an election to take under it, *Mendenhall v. Mendenhall*, 8 Jones Law 287, or accepting a testamentary trust and administering it, *Delay v. Venal*, 1 Metc. 57; but where it does not appear that the widow acted with a full knowledge of the condition of her husband's estate, or of her rights, her acts in paying the debts of her husband out of his money, receiving and holding the balance, and having control of the real and personal estate, do not constitute an election to take under a will, by the terms of which the wife was given the residue of the real and personal estate of her husband, after the payment of his debts, for life, the will not having been proved, and the wife dying within the statutory time for an election to take under the will, *Milliken v. Welliner*, 13 Reporter 346, 37 Ohio St. 460.

The bare receipt of articles, specifically bequeathed to the widow, will not, without more, determine her election, *Duncan v. Duncan*, 2 Yeates 302.

Ordinary proceedings at law, to obtain dower, constitute a sufficient election against the will, *Quarles v. Garrett*, 4 Desau. 145; where an annuity is given to the widow in lieu of dower, and charged on land devised, and the devisee refuses to pay, the bringing of an action to recover the annuity is a sufficient election to take under the will, *Van Orden v. Van Orden*, 10 Johns. 30.

For other instances of what is and what is not a binding election, see *English v. English*, 2 Green Ch. 504; *O'Driscoll v. Koger*, 2 Desau. 295; *Tooke v. Hardeman*, 7 Geo. 20; *Dixon v. McCue*, 14 Gratt.; *Thompson v. Hoop*, 6 Ohio St. 480; *Reed v. Dickerman*, 12 Pick. 146; *Upshaw v. Upshaw*,

2 H. & Mun. 381; *Ambler v. Norton*, 4 Id. 28; *Clay v. Hart*, 7 Dana 1; *Craig v. Walthall*, 14 Gratt. 518; *Avants v. Robertson*, 2 McM. 215; *Exrs. of Green v. Green*, 7 Porter 19; *Hawley v. James*, 5 Paige 318; *Cauffman v. Cauffman*, 17 S. & R. 16.

A renunciation of the will may be conditional, and the condition upon which it depends may be the death of the widow herself, *McCallister v. Brand's Heirs*, 11 B. Mon. 371.

Enactments as to Time of Election.

In many States, the time within which the widow must make her election is fixed by statute. In New York, Rev. St. (1882), Pt. 2, Ch. 1, Tit. 3, § 14; Nebraska, Comp. St., Ch. 23, § 18; Wisconsin, Rev. St., Pt. 2, Tit. 20, Ch. 98, § 2172; Michigan, Comp. Laws, Vol. 2, Tit. XXII., Ch. CLI., § 4287; Oregon, Gen. Laws, Ch. 17, Tit. 1, § 19, p. 586; the time fixed is one year from the death of the husband.

In Missouri, R. S., Vol. 1, § 2200; Kentucky, Gen. Stat. (1878), Ch. 31, § 12; Illinois, Rev. St., Ch. 41, § 11; Alabama, Code (1876), Pt. 2, Tit. 4, Ch. 2, Art. 1, §§ 2292-3; Tennessee, Stats., Vol. 1, Tit. 3, Ch. 3, § 2404; one year from the probate of the will.

In North Carolina, Batt. Rev., Ch. 117, § 6, and New Jersey, Rev. of 1877, p. 322, pl. 16, six months from the probate of the will.

In Maryland, six months from the grant of letters upon the will, Rev. Code (1878), Tit. XXIV., Art. 50, § 228, p. 475.

In Ohio, one year from the issue of a citation to the widow to elect, Rev. St., Pt. 3, Tit. 2, Ch. 1, § 5963.

In Arkansas, eighteen months from the death of the husband, Rev. St., Ch. XLIX., § 2237.

Effect of Failure to Elect.

If the widow fail to manifest her election within the time allowed by the statute, she will, in general, be held to have elected the provision in the will; see statutes above, and *Craven v. Craven*, 2 Dev. Eq. 338; *Pratt v. Felton*, 4 Cush. 174; *McLeod v. McDonnell*, 6 Ala. 236; *Pettijohn v. Beasley*, 1 Dev. & B. 254; *Malone v. Majors*, 8 Humph. 577; *Stephens v. Gibbes*, 14 Fla. 331; *Vaughan v. Vaughan's Heirs*, 30 Ala. 329; and in Connecticut, it is declared, by statute, that silence on the part of the widow is to be interpreted an acceptance of the provision, Gen. St. (Rev. 1875), Tit. 18, Ch. II., Art. IV., § 4.

In Iowa the rule is otherwise, and there the silence of the widow for six

months after a notice, given to her by a party in interest, to elect, is construed as an election to retain dower, Annotated Stats. (McClain 1880), Tit. XVI., Ch. 4, § 2452, p. 656; and see Missouri, *Welch v. Anderson*, 28 Mo. 293.

Independently of statute, however, silence for a long time is held to be an election to take under the will, *Reed v. Dickerman*, 12 Pick. 146; *Noell v. Garnett*, 4 Call 92; especially where the provision is more advantageous to the widow than her dower would be, *Merrill v. Emery*, 10 Pick. 507; *Sloan v. Whitaker*, 58 Ga. 319; but see *Blunt v. Gee*, 5 Call 481; and the rule is otherwise in Ohio, where silence implies an election of dower; *Stilley v. Folger*, 14 Ohio 610; *Bowen v. Bowen*, 34 Ohio St. 164.

It has been held that a suspension of the statute of limitations will not extend the time given to the widow for her election, *Stephens v. Gibbes*, 14 Fla. 331; but the decision to the contrary in *Hinton v. Hinton*, Phil. Law 410, seems more in consonance with the general spirit of the law, and with the favor with which the courts generally regard dower.

Where the widow has been prevented, by fraud and misrepresentation, from filing a dissent to the will in due time, she may be relieved in equity, *Smart v. Waterhouse*, 10 Yerg. 94, and, on cause shown, a chancellor may extend the time allowed by the statute, so as to enable the widow to make an intelligent choice, *Smither v. Smither's Exr.*, 9 Bush. 230; but it is not ground for relief, that the widow was erroneously advised by counsel, one of the executors of the will, that she had a longer time in which to elect than that actually given by the statute, *Waterbury v. Waterbury*, 6 Heisk. 512.

Where the will contains no provision for the widow, she will not be compelled to go through the idle formality of renouncing the will in order to obtain her dower, *Cumming's Exr. v. Daniel*, 9 Dana 361; *Martin v. Martin*, 35 Ala. 560; *Hilliard v. Binford*, 10 Id. 977; in Tennessee, it is held that where the husband dies insolvent, no formal dissent from his will is necessary to entitle the widow to her dower, *Jarman's Exr. v. Jarman's Heirs*, 4 Lea 671; and in Missouri, under the statute of 1835, it was held that where the provision was of personalty only, the widow need not renounce as to the will, *Hamilton v. O'Neil*, 9 Mo. 11; and see *Jennings v. Smith*, 29 Ill. 116.

Right of Election Personal.

The right to elect is one personal to the widow, and does not survive to her heirs or representatives, *Boone's Rep. v. Boone*, 3 Har. & McH. 95; *Crozier's Appeal*, 90 Pa. St. 384; *Donald v. Portis*, 42 Ala. 29; and they cannot retract her election on making compensation, *Buist v. Dawes*, 3 Rich.

Eq. 281; *Milliken v. Welliner*, 13 Reporter 346, 37 Ohio St. 460; and the right must be exercised by the widow in her lifetime; she cannot, therefore, exercise it by will, *Kyne v. Kyne*, 48 Iowa 21; when, however, the widow has actually made her election, and there remains nothing but a mere formality to give full effect, that formality may be complied with after her death. Thus in *McGrath v. McGrath's Admr.*, 38 Ala. 246, the widow had executed a dissent, in due form, and handed it to a friend with instructions to file it, as required by law. Before it was filed, however, the widow died, and after her death, but within the statutory time allowed for an election, the dissent was filed. It was held that the widow had sufficiently renounced the will and had elected her dower. In South Carolina, in *Snelgrove v. Snelgrove*, 4 Desau. 274, an election was allowed to be made by a widow's representatives after her death.

The right of election is so far a personal right that it has been held that an insane widow, incapable of making an election, is barred by the effluxion of the statutory time, there being no provision in the statute for the case of lunacy, *Collins v. Carman*, 5 Md. 503; and that the committee of an insane widow cannot elect for her, *Lewis v. Lewis*, 7 Ired. Law 72; but a more liberal doctrine was held in *Wright v. Wright*, 2 Lea 78, where a lunatic widow was allowed, in equity, to take dower as though she had dissented from the will in due time; and in *Kennedy v. Johnston*, 65 Pa. St. 451, it was held, that while the committee of a lunatic widow could not elect for her, yet the Court might; but the Court will not make an election after the widow's death, *Crozier's Appeal*, 90 Pa. St. 384. In *Brown v. Hodgdon*, 31 Me. 65, an insane widow waived the provision of the will; when lucid, she showed no intention of avoiding her waiver, and her guardian assented thereto; it was held that she had sufficiently elected dower.

How far the Bar of an Acceptance Extends.

Where the widow accepts the provision in lieu of dower, there is a division of authority as to whether dower is thereby barred as to lands which have been previously sold by the husband, or only as to those of which he dies seized. It is held, in the following cases, that the bar applies to all lands of which the wife would otherwise have been endowed, whether held by him at the time of his death, or which have been aliened either by his own act or by that of the law, *Durham v. Rhodes*, 23 Md. 233; *Chapin v. Hill*, 1 R. I. 446; *Allen v. Pray*, 12 Me. 138; *Steele v. Fisher*, 1 Edw. 435; *Moore v. Steidel*, 1 Disney 281; *Haynie v. Dickens*, 68 Ill. 267; *Hornseby v. Casey*, 21 Mo. 545.

It was held otherwise in *Borland v. Nichols*, 12 Pa. St. 38; *Westbrook v.*

Vanderburg, 36 Mich. 30; *Braxton v. Freeman*, 6 Rich. 35; *Corriell v. Ham*, 2 Iowa 552; and see *Leinaweaver v. Stoeper*, 1 W. & S. 160; *Crecelius v. Horst*, 4 Mo. App. 419. The provision will be a bar to dower in land acquired after the date of the will, *Raines v. Corbin*, 24 Ga. 185.

Bequest in Lieu of Dower—Incidents thereof.

A bequest in lieu of dower is not subject to contribution for a deficiency with the other bequests of the same class, *Lord v. Lord*, 23 Conn. 327; *Hubbard v. Hubbard*, 6 Met. 50; *Williamson v. Williamson*, 6 Paige 305; *Stuart v. Carson*, 1 Desau. 506; *Isenhardt v. Brown*, 1 Edw. 411; or abatement, *Howard v. Francis*, 30 N. J. Eq. 444; *Tevis's Exrs. v. McCreary*, 3 Metc. 151; but the testator's debts will be paid in preference to the bequest to the widow, *Isenhardt v. Brown*, *supra*; and they will be a lien upon the land given and accepted in lieu of dower, *Bray v. Neill's Ex'x*, 21 N. J. Eq. 343; and the said land will be also subject to the incumbrances placed upon it by the husband, *Inge v. Boardman*, 2 Ala. 331; an election relinquishing dower, relinquishes also all the incidents thereof, and, therefore, after such an election, the widow cannot claim the rent of a mansion house to which she would be otherwise entitled, *Wigley v. Beauchamt*, 51 Mo. 545, overruling *Orrick v. Robbins*, 34 Id. 226.

It has been sometimes maintained, that where the wife takes a provision in lieu of dower, she is to be regarded as a purchaser to the extent of her dower, *Thomas v. Wood*, 1 Md. Ch. 296; but see *Mitchener v. Atkinson*, Phil. Eq. 23.

In *Tracy v. Murray*, 44 Mich. 109, the Supreme Court of Michigan reviewed the authorities on the subject, and MARSTON, C. J., after stating the English rule, and examining *Burridge v. Bradly*, 1 Peere Williams, 127; *Davenport v. Fletcher*, Ambl. 244; and *Blomer v. Moviet*, 2 Ves. 420, said: "If we adopt the view of the early English decisions, the creditors of the deceased are left entirely at his mercy, subject only to the right to attack the bequest as fraudulent. Accepting as correct the doctrine of those cases which hold that the widow becomes a purchaser of the legacy by releasing her dower, the contract is not a completed one until her acceptance of the provision of the will after her husband's decease. Had he purchased from his wife her dower, and given her his note therefor, upon his death such obligation, if not paid, would simply become a claim against his estate, and take its place, when proved against his estate, with the other allowed claims. The husband, during his lifetime, wishing to make an arrangement to have his wife release her dower interests in the lands of which he should die seized, makes an offer therefor, which is not to be submitted to her for

acceptance until after his decease. If then accepted, the consideration to be paid becomes a claim and charge against the estate, and takes precedence over the legacies. It is but a debt against the estate. If there are sufficient assets to pay all the claims allowed against the estate in full, the widow receives the full amount of her claims; if not, she receives her *pro rata* with the other creditors."

Where the widow accepts the provisions of a will, she has no equity to charge the amount bequeathed her upon land devised to others, *Paxson v. Potts*, 3 N. J. Eq. 313.

Where a condition is attached to a provision or devise in lieu of dower, the condition must be observed, *Collins v. Woods*, 63 Ill. 285; and if the widow forfeit the estate devised to her by her voluntary violation of the condition, she will not be entitled to be relieved by a revival of her claim for dower, *Taylor v. Birmingham*, 29 Pa. St. 306; *Gough v. Manning*, 26 Md. 347.

Failure of Provision.

When the provision or devise made and accepted fails, as by its being taken to pay the debts of the testator, the right of dower is revived, *Morrow v. Morrow*, 3 Tenn. Ch. 532; *Gist v. Cattell's Heirs*, 2 Desau. 53; *Griffith v. Griffith's Exrs.*, 4 Har. & McH. 101; *Coomes v. Clements*, 4 Har. & J. 480; *Chew v. President of Farmer's Bank*, 9 Gill 361; and the failure need not be total; it is sufficient that it be of a substantial part of the provision, *Hastings v. Clifford*, 32 Me. 132.

In *Thomas v. Wood*, 1 Md. Ch. 286, a failure which reduced the value of the provision to below that of dower, was held sufficient to entitle the widow to compensation by way of dower.

Bar by Joinder of Wife in Husband's Deed.

The only way in which, formerly, dower could be barred by the act of the wife, in her husband's lifetime, was by levying a fine alone, or by joining with her husband in a fine and recovery, *Portington's Case*, 10 Co. 43; *Lampel's Case*, Id. 49; but these methods seem never to have obtained in this country, and there soon sprang up the custom of barring dower by the wife joining in her husband's deed, with a view thereby to bar her dower. This, which is recognized as an exceptional exercise of power by the wife by STORY, J., in *Powell et ux. v. Monson and Brimfield Manufacturing Co.*, 3 Mason 347, existed from an early time in Massachusetts, *Fowler v. Shearer*, 7 Mass. 14, has become the custom throughout the Union, and is recognized

and established by statute in many of the States. See Illinois, Rev. St., Ch. 30, § 17, p. 268; Alabama, Code (1876), Pt. 2, Tit. 3, Ch. 2, Art. 1, § 2234; Missouri, Rev. St., Vol. 1, Ch. 20, § 669, p. 109; Nebraska, Comp. Laws, Ch. 73, § 43 (but in this State joinder is not necessary, and the wife may bar her dower by her separate deed); Maine, Rev. St. (1871), Tit. IX., Ch. 103, § 6, p. 757; Maryland, Rev. Code (1878), Tit. XXV., Art. 51, § 30; Michigan, Pub. Acts 1877, § 13, p. 52; Rhode Island, Tit. 20, Ch. 166, § 11, p. 423; South Carolina, Ch. 83, §§ 1, 2, 3, p. 429; New Jersey, Rev. of 1877, p. 155, pl. 9; Wisconsin, Rev. St., Ch. 100, § 2222; Oregon, Sts., Ch. 17, § 13; Massachusetts, Ch. 124, § 6; North Carolina, Bat. Rev., Ch. 117, § 5; and where a statute provides for the relinquishment of dower, it is regarded as a substitute for the fine and recovery, and its relinquishments must be substantially complied with, *O'Ferrall v. Simplot*, 4 Iowa 381.

The usual way, in Massachusetts, of barring dower by deed, is said, by PARSONS, C. J., in *Fowler v. Shearer*, *supra*, to have been by introducing the wife, at the close of the deed, as expressly relinquishing all claim to dower in the premises conveyed, and by her executing the deed with her husband.

Deed must Show Intention to Bar Dower.

The mere joinder of the wife in the deed of her husband, when the deed contains no words manifesting an intent that the dower should be barred thereby, will not be a release of the wife's dower to the purchaser, *Catlin v. Ware*, 9 Mass. 218; *Davis v. Bartholomew*, 3 Ind. 485; *Lothrop v. Foster*, 51 Me. 367; *Lufkin v. Curtis*, 13 Mass. 223; even where the deed contains a warranty, *Stevens v. Owen*, 25 Me. 94; and see *Westfall v. Lee*, 7 Iowa 12.

Merely signing and sealing the deed of the husband do not sufficiently manifest an intent to bar dower, *Cox v. Wells*, 7 Blackf. 410; the law, however, is otherwise in New Hampshire, *Dustin v. Steele*, 27 N. H. 431; *Burge v. Smith*, Id. 332.

The deed will not bar dower where the wife's signature is said to be in "token of assent," *Leavitt v. Lamprey*, 13 Pick. 382; or "in token of free consent," *Stevens v. Owen*, 25 Me. 94; or where the wife merely signs and joins in the covenants, *Davis v. Bartholomew*, 3 Ind. 485; but it is held otherwise in Iowa, *Edwards v. Sullivan*, 20 Iowa 500; or where the wife is mentioned only in the clause describing the parties to the deed, and in the attesting clause, the covenants being by the husband alone, and no terms are employed which touch dower, *Carter v. Goodin*, 3 Ohio St. 75; *McFarland v. Febiger's Heirs*, 7 Ohio 194.

It is not necessary that dower be mentioned by name; it is sufficient if, . . in the deed, expressions are used that will cover it; thus in *Gillilan v. Swift*,

21 N. Y. S. C. 574, a deed granting "all the estate, right, title, interest, property, possession, claim, and demand whatsoever, as well at law as in equity of the said parties of the first part," and signed by husband and wife, was held sufficient to bar the wife's dower.

Uniting in the grantor's part of the deed is sufficient to bar dower, *Smith v. Handy*, 16 Ohio 191; and proper words of grant need not be used where the attestation clause recites that the deed is signed by the wife in testimony of her release of dower, *Stearns v. Swift*, 8 Pick. 532; *Frost v. Deering*, 21 Me. 156; *Learned v. Cutler*, 18 Pick. 9; *Usher v. Richardson*, 29 Me. 415.

Statutory Provisions as to Execution and Acknowledgment.

In Alabama, the deed in which the wife joins to bar her dower must be executed in the presence of two witnesses, who must attest the same. Code (1876), Pt. 2, Tit. 3, Ch. 2, § 2234.

In several States, there are statutory provisions that the wife's signature must be acknowledged before a proper officer, Michigan, Comp. Laws, Vol. 2, T. XXII., C. CLI., § 4281; Wisconsin, Rev. St., Ch. 100, § 2222; Nebraska, Comp. St. (1881), Part. 1, C. 23, § 12; Oregon, Ch. 17, § 13, p. 585; New Jersey, Rev. of 1877, p. 155, pl. 9; South Carolina, Ch. 83, §§ 1, 2, 3, p. 429; Missouri, Rev. St., Vol. 1, Ch. 29, § 2197; Illinois, R. S., Ch. 30, § 19, p. 268; and in some it is required that the wife be separately examined, in order to ascertain whether the deed is executed by her of her own free will, and without compulsion on the part of her husband, South Carolina, Ch. 83, §§ 1, 2, 3, p. 429; and see *Gough v. Walker*, 1 Nott. & McC. 469; Delaware, Rev. Code (1874), Ch. LXXXIII., § 4; Florida, McClell. Dig., Ch. 95, § 14; North Carolina, Bat. Rev., Ch. 117, § 5. Separate examination is declared, by statute, unnecessary in Maryland; see Rev. St. (1878), Tit. XXV., Art. 51, § 30, p. 483.

In general, it may be said, that where the conveyance of the real estate of a married woman is regulated by statute, and there is no especial statutory regulation of the conveyance of dower, a deed which sufficiently complies with the requirements of the statute to pass the land of the married woman will be a good conveyance in bar of her dower.

Where an acknowledgment is required by the statute, the requirement is not a mere directory enactment, but one which constitutes the acknowledgment a substantial part of the deed; and a conveyance, joined in by the wife, but having a defective acknowledgment, will not take effect so as to bar the wife's dower, *Kirk v. Dean*, 2 Binn. 341; *Moore v. Thomas*, 1 Oreg. 201; *Sheppard v. Wardell*, Coxe 452; *Elliott v. Piersol*, 1 Pet. 328; *Hepburn v. Dubois's Lessee*, 12 Id. 345; *Stidham v. Matthews*, 29 Ark. 650; but in Iowa

the law is held to be that a defective acknowledgment will not prevent the operation of the deed between the parties thereto, *Lake v. Gray*, 30 Iowa 415.

The same remark will apply where a separate examination is required; it is an essential part of the conveyance, *Sheppard v. Wardell*, *supra*; *Fowler v. McClurg*, 6 S. & R. 143.

The certificate of acknowledgment need only show a substantial compliance with the requirements of the act, *Dundas v. Hitchcock*, 12 How. 256; *Russell v. Rumsey*, 35 Ill. 362; *Hughes v. Lane*, 11 Id. 123; *Hughes v. McKinsey*, 5 T. B. Mon. 38; but it is not sufficient that the requirements have been complied with; they must appear in the certificate, or be fairly inferable from it, *Raverty v. Fridge*, 3 McL. 230; *Brown v. Farran*, 3 Ohio 142; *Owen v. Paul*, 16 Ala. 130.

A certificate of the proper officer, that the wife, "she being examined by me as the law directs, voluntarily relinquished" her dower, has been held sufficient, upon the principle of *omnia præsumuntur rite et sollemniter esse acta*; and see *Watson v. Clendenin*, 6 Blackf. 477; *Stevens v. Doe d. Henry*, Id. 475; but a certificate which does not state that the wife relinquished dower, has been held incurably defective even in equity, *Russell v. Rumsey*, 35 Ill. 362. And so a certificate which stated simply that the wife, being of full age, had been separately and apart from her husband examined, and acknowledged the instrument to be her act and deed, has been held defective, as not showing that the wife acted without the coercion or compulsion of her husband, *Fowler v. McClurg*, 6 S. & R. 143.

The certificate must show that the wife has been separately examined, *Clark v. Redman*, 1 Blackf. 379; *Rogers v. Woody*, 23 Mo. 548; *Elwood v. Klock*, 13 Barb. 50; *Sheppard v. Wardell*, Coxe 452; and it has also been held that a certificate which does not show that the wife was acquainted with the contents of the deed by which she released dower, was fatally defective, *O'Ferrall v. Simplot*, 4 Greene (Iowa) 162; *Connell v. Connell*, 6 Ohio 353; *Lessee of Good v. Zercher*, 12 Id. 364. The Ohio cases have, however, been overruled by *Chesnut v. Shane's Lessee*, 16 Ohio 599.

It has also been held that the certificate must show that the person releasing dower was known to the officer taking the acknowledgment, *Gove v. Cather*, 23 Ill. 634.

The absence of an official seal, where one is required by law, is a fatal defect in a certificate, *Watson v. Clendenin*, 6 Blackf. 477.

Record evidence of acknowledgment is indispensable, *Tomlins v. McChord's Rep.*, 5 J. J. Mar. 135; *Ellwood v. Klock*, 13 Barb. 50; the acknowledgment cannot be shown by parol or the certificate be amended thereby, Id. *O'Ferrall v. Simplot*, *supra*; *Watson's Lessee v. Bailey*, 1 Binn. 470; *Barnet v. Barnet*, 15 S. & R. 73; *Elliott v. Piersol*, 1 Pet. 339.

Constitutionality of Acts assuming to Cure Defective Acknowledgments.

Where, after a defective acknowledgment, the Legislature has passed a curative act, the constitutionality of such act has been drawn into question.

In *Tate v. Stooltzfoos et al.*, 16 S. & R. 35, such an act came before the Supreme Court of Pennsylvania, and its constitutionality was upheld. DUNCAN, J., in delivering the opinion of the Court, said: "The general rule is that all laws are in their nature prospective; yet this does not prohibit the Legislature from passing some laws which have a retrospective operation, where the laws do not impair the obligation of contracts, or are not *ex post facto* (*ex post facto* laws relate to crimes only). Every confirmatory act is, in its nature, retrospective, and in the opinion of this Court, delivered in *Underwood v. Lilly*, 10 S. & R. 101, it is stated 'that confirming acts are not uncommon. Deeds acknowledged defectively, by femes covert proceedings, and judgments of commissioners and justices of the peace, who were not commissioned, agreeably to the Constitution, or when their power ceased on the division of counties until a new appointment. Retrospective laws which only vary the remedies, divest no right, but merely cure a defect in proceedings otherwise fair, the omission of formalities, which do not diminish existing obligations, contrary to their situation, when entered into. These, and several like acts, are clearly constitutional.' I have seen no reason to change that opinion. I will just add, that it is an abuse of terms to contend that this is an act divesting vested rights. Such acts would be odious and unjust as well as unconstitutional; for it is not intended, by a vested right, that it shall be a right to do wrong; to take advantage of a mere slip in form, when the transaction is a *bona fide* one, and to avoid an honest conveyance, fairly acknowledged, in the hands of an innocent purchaser." And see *Raverty v. Fridge*, 3 McL. 230; *Watson v. Mercer*, 8 Pet. 109; *Chesnut v. Shane's Lessee*, 16 Ohio 599.

In *Russell v. Rumsey*, 35 Ill. 362, however, it was held that a curative act would not have the effect of making an anterior conveyance, defectively acknowledged, a bar; the Court holding that dower, though inchoate, was "a vested, although imperfect, and contingent right." The same doctrine was held in the *Lessee of Good v. Zercher*, 12 Ohio 364, overruled in *Chesnut v. Shane's Lessee*, *supra*.

Bar by Separate Deed of Wife.

In *Fowler v. Shearer*, 7 Mass. 14, it was said, by PARSONS, C. J., that the wife might bar her dower, *either* by joining with her husband, or by her

separate deed, executed subsequently to the conveyance, and reciting the sale as the consideration for the release of dower. This, however, is in the face of the great mass of the authorities, which hold a subsequent separate deed of the wife ineffectual, thus making no distinction between it and one executed by her without her husband, while he still remained seized of the property in which dower is released, *Ulp v. Campbell*, 19 Pa. St. 361; *Dodge v. Aycrigg*, 1 Beas. Eq. 82; *Moore v. Rake*, 2 Dutch. 574; *Page v. Page*, 6 Cush. 196; *Shaw v. Russ*, 14 Me. 432; *French v. Peters*, 33 Me. 396; *Moore v. Tisdale*, 5 B. Mon. 352; *Marvin v. Smith*, 46 N. Y. 571; *Stidham v. Matthews*, 29 Ark. 650; but such a release has been held good, *Ela v. Card*, 2 N. H. 175; *Shepperd v. Howard*, Id. 507, in which latter case the Court gave as a reason for excepting such a separate deed of a married woman from the general rule which declares her deeds not joined in by her husband to be void, that "no interest of the husband is affected by the deed; it can have no operation during his life; and while a wife is permitted, by joining in a deed with her husband, to bar her right of dower, there seems to be no reason why she should not be permitted to release her right by a separate deed."

It is submitted, however, that the void character of the deed arises from the disability which the law, for her own protection, imposes upon the wife, and not from a desire to protect the rights of the husband; and a case may be well imagined, where a husband, exercising his judgment for the benefit of his wife, would be very willing to sell and convey all of his own interest in his land, and yet be unwilling to have his wife deprived of the support after his death, assured to her by the law.

In *Osborn v. Osborn*, 19 Ill. 124, it was held, that the disability under which the wife is from a second marriage, will prevent her releasing dower in the land of her first husband without the assent of her second; and see also *Bailey v. West*, 41 Ill. 290.

In Alabama, by the Code (1876), Pt. 2, Tit. 3, Ch. 2, Art. 1, § 2234, p. 578, it is provided that a wife may, by her separate deed, release dower to the alienee of land conveyed by her husband; and see *Robinson v. Moon*, 56 Ala. 241; a like rule prevails in Michigan, Pub. Acts. 1877, § 13, p. 52, when the intent to bar the dower is expressed in the deed.

Acknowledgment by Husband and Wife on Different Days does not Destroy the Joint Character of the Deed.

The acknowledgment of the husband and wife may be taken on different days, *Williams v. Robson*, 6 Ohio St. 510, or the joint deed may be executed by them on different days, *Frost v. Deering*, 21 Me. 156; and the deed

will be joint, and a good bar of dower ; and where, on the same paper, but under the signatures, the wife executes a release of dower, it will be considered as one with the body of the deed, and, hence, as constituting a good bar, *Dundas v. Hitchcock*, 12 How. 256.

Bar when Husband is Insane.

The joinder of the wife in a conveyance by the guardian of an insane husband, acting under an order of court, will bar her dower in the property conveyed, *Rannells v. Gerner*, 9 Mo. App. 506 ; so, also, will her joinder with her husband's duly constituted attorney, *Glenn v. Bank of the United States*, 8 Ohio 72.

When Wife is an Infant.

In the absence of statutory enactments giving her the power, an infant feme covert is not able to bar her dower, *Hughes v. Watson*, 10 Ohio 127 ; *Bool v. Mix*, 17 Wend. 119 ; *Adams v. Palmer*, 51 Me. 480 ; *Oldham v. Sale*, 1 B. Mon. 76 ; *Priest v. Cummings*, 16 Wend. 617 ; *Sanford v. McLean*, 3 Paige 117 ; and, although the deed is executed with all formalities, she may, on coming of age, avoid it ; and it is held that she may do so without any specific act disaffirming her deed before bringing suit, *Hughes v. Watson*, *supra* ; *Drake v. Ramsay*, 5 Ohio 252.

By statute, in some States, a married infant is permitted to release or convey her dower, Alabama Code (1876), Pt. 2, Tit. 3, Ch. 2, Art. 1, § 2236 ; see *Robinson v. Moon*, 56 Ala. 241 ; Maine, Rev. St., Tit. IX., Ch. 103, § 6, p. 757 ; see *Adams v. Palmer*, 51 Me. 480 ; and in Maryland, it is provided that she may join with her husband in a lease or conveyance, and if the Court of Equity shall deem such lease or conveyance equitable, expedient, or proper with respect to the dower, it may adjudge that the deed shall be of like effect as if the feme covert were of full age, Rev. Code (1878), Tit. XXVI., Art. 65, § 105, p. 651.

Where Deed is Executed by Attorney for Wife.

As a married woman could not, at common law, act by attorney, so a deed, executed by virtue of a power of attorney, given by her, and as to which she was privately examined, will not bar her dower, *Lewis v. Cox*, 5 Harring. 401 ; but such conveyance, by a married woman, by power of attorney, is expressly permitted in Missouri, Rev. St., Ch. 20, § 670, p. 110 ; and in any State in which a married woman is permitted to act, generally,

by attorney, a deed executed by her duly constituted attorney will have the effect of barring dower.

By Wife who has been Deserted by her Husband.

A wife, who has been deserted by her husband, may, after the presumption of the husband's death has arisen, bar her dower by joining with his children in a conveyance of his land, *Rosenthal v. Mayhugh*, 33 Ohio St. 155; and in New Jersey, by statute, a woman living separate from her husband, by virtue of a decree obtained on her application, and entitled to alimony, may release her dower by separate deed, Rev. of 1877, p. 639, pl. 17.

Bar of Dower of Insane Wife.

An insane woman, of course, cannot make a deed, and, therefore, her joinder in the deed of her husband will not bar dower. In *Ex parte McElwain*, 29 Ill. 442, a petition was presented setting forth the petitioner's wife's insanity, and praying the Court to appoint a suitable person to execute a conveyance which should bar her dower in land which the petitioner had sold, the Court refused the petition with strong expressions of disapprobation.

In many States, however, the case of an insane wife has been provided for by statutes, by virtue of which, on a petition being presented, the Court will order a conveyance to be made, by the guardian or committee of the lunatic, barring dower, a proper provision having been made for the wife's support. See Illinois, Rev. St., Ch. 68, §§ 17, 18, p. 593; Wisconsin, Rev. St., Ch. 100, Tit. 21, §§ 2225, 2226, p. 638; Missouri, Rev. St., Vol. 1, Ch. 29, § 2235, p. 371; Ohio, Rev. St., Tit. 1, Div. 7, Ch. 7, § 5725; West Virginia, Rev. St., Ch. 112, § 10, p. 729; Virginia, Code, Tit. 36, Ch. 124, p. 933; Massachusetts (1882), Ch. 147, §§ 20, 21, p. 821; Michigan, Laws 1873, Vol. I., p. 479.

It seems, however, that the guardian of a lunatic wife will not *ex mero officio* have authority to join in a deed of the husband so as to bar dower, *Eslava v. Lepretre*, 21 Ala. 504.

In those States where no especial provision is made whereby the dower of an insane woman can be barred, it is thought that the statutes which provide for the sale of the real estate of an insane person, will be construed so as to cover the case of a wife's inchoate dower. Thus in Pennsylvania, under the Act of April 11, 1866, P. L. 780, Pur. Dig., Vol. 2, p. 985, in an unreported case, in which one of the editors of the present work was of counsel, the husband of a lunatic was allowed, by a decree, to convey

a piece of land free of dower, the Court being first satisfied of the husband's ability to properly provide for his wife, and directing him to enter into a bond to secure her support, *In Re Petition of Bailley*, Com. Pleas, Phila., No. 4, June T., 1877, No. 609.

Dower cannot be Barred by Parol.

The wife will not be barred of her dower by a parol relinquishment, *Davis v. McDonald*, 42 Ga. 205, no matter how formally made or certified, *Worthington v. Middleton*, 6 Dana 300; for, as it is an estate, or, at least, an interest, for life in land, the statute of frauds will prevent its being released or discharged, except by some instrument in writing, *Carnall v. Wilson*, 21 Ark. 62; *Keeler v. Tatnell*, 3 Zab. 62; *White v. White*, 1 Harr. (N. J.) 202; *Davis v. McDonald*, 42 Ga. 205; and an agreement to release dower cannot be shown by parol, so as to give effect, as a bar of dower, to a deed joined in by the wife and husband, which does not contain words apt to cover dower, *Lothrop v. Foster*, 51 Me. 367, and see *Harrison v. Carroll*, 11 Leigh. 476; but an agreement by parol, made by the wife after her husband's death, and while she is under no disability, by which she is to receive a certain sum in lieu of dower, followed by an actual receipt thereof, may be sustained in equity as a good bar of dower, *Warfield v. Castleman*, 5 T. B. Mon. 517; *Simpson's Appeal*, 8 Pa. St. 109; and the Supreme Court of Kentucky has even gone farther, and in *Connelly v. Bransiter*, 3 Bush. 702, where, at a sale of her husband's land, the wife had publicly announced that she would not claim dower as against the purchaser, she was held estopped from claiming it. ROBERTSON, J., remarking that "the disability of coverture could not exonerate against fraud."

It may well be questioned, however, whether this last case can be regarded as authority, since disability is not to be considered as a privilege to be set up by the disabled person, or of which she may be deprived by her dishonesty. The books are full of cases to the effect that fraud will not give a power to a married woman which she had not by reason of her coverture; and in *McFarland v. Febiger's Heirs*, 7 Ohio 194, the Court even went to the extent of holding that where a married woman joined in a deed which she believed to be (and which was) inoperative as to herself, and kept silent as to her knowledge, she was not estopped by her fraud from claiming dower. In the language of the Court: "Whatever might be the effect of such conduct in one acting in her own right, it cannot be imputed as a fraud to a married woman, disabled to contract except upon one subject, and that only in prescribed form."

Deed Defective as to Husband Creates no Bar.

If the deed, in which the wife joins to bar her dower, is defective as to the husband, her dower will not be barred thereby; but her conveyance, which is merely to attend that of her husband, will fall with it, *Kay v. Jones*, 7 J. J. Mar. 38.

Release of Dower by Wife to Husband.

A release of dower by the wife to her husband is void whether made by a deed to him, *Carson v. Murray*, 3 Paige 483; *Pillow v. Wade*, 31 Ark. 678; *Countz v. Markling*, 30 Id. 17; *Wilber v. Wilber*, 52 Wisc. 298, or by a deed tripartite, to which the husband, wife, and a trustee for the wife are parties, by which, in consideration of the wife's having the enjoyment of her property, dower is relinquished, *Townsend v. Townsend*, 2 Sand. 711. In the case of *Robertson v. Robertson*, 25 Iowa 350, it was held that under Section 2215 of the Iowa statutes, the wife might release dower to her husband; but this case seems to be overruled by *McKee v. Reynolds*, 26 Id. 578, which makes no mention of the statute, but holds on general principles a doctrine contrary to that of *Robertson v. Robertson*. Where, however, the wife has received a consideration for her release, and continues to hold the same after the death of her husband, she will not be allowed to retain both consideration and dower, and her continued holding of the former for any considerable length of time, *Lively v. Paschal*, 35 Ga. 218, or an attempt to enforce it, *Stoddard v. Cutcompt*, 41 Iowa 329, or, in the case of an annuity being the consideration, its continued receipt after the husband's death, *Evans v. Evans*, 3 Yeates 507, will be regarded as an election, after the husband's death, to take a settlement in lieu of dower.

The fact that the wife is living apart from her husband will not make valid her release to him, *Evans v. Evans*, *supra*; in New Jersey, however, a woman living separate from a husband by virtue of a decree obtained by her, and entitled to alimony, may make such a release. Rev. of 1877, p. 639, pl. 17.

Release of Dower by Separation Agreement.

It has been held that an agreement between husband and wife, by the terms of which they are to live separate, and the wife, either in consideration of the separation or of the payment of a sum of money, surrenders her dower, and each party gives up all right in the estate of the other, will not bar the wife's dower, *Stephenson v. Osborne*, 41 Miss. 119; *Guidet v. Brown*, 54 How. Pr. 409, S. C. 3 Abb. N. C. 295; *Carson v. Murray*, 3

Paige 483; and the law is the same, although the wife is represented by a trustee, *Stephenson v. Osborne*, *supra*; but a separation agreement, whereby, in consideration of the transfer of certain property to the use of the wife, her trustee undertook to indemnify the husband against any claim of dower, has been held good as against the trustee, *Gaines' Admx. v. Poor*, 3 Met. (Ky.) 503.

And there are authorities which sustain a surrender of dower in a separation agreement. *Dillinger's Appeal*, 35 Pa. St. 357; *Hitner's Appeal*, 54 Id. 110; but such an agreement must be in definite words under seal, and must contain words aptly referring to dower, *Walsh v. Kelly*, 34 Pa. St. 84; and it seems that to uphold the agreement of separation its object must be an actual and immediate, and not a contingent or future, separation, *Hutton v. Hutton's Admr.*, 3 Pa. St. 100.

Release by Wife after Divorce.

After a divorce, which severs the legal unity and relieves the wife from the presumption of the control of her husband, she may release her dower to her late husband, *Savage v. Orill*, 26 N. Y. S. C. 4. Affirmed by Court of Appeals on the opinion of the Court below, Feb. 3, 1880.

Release must be to the Owner of the Title to the Land or to One in Privity therewith.

A release of dower to be of effect must be made to one having title or being in privity with the title to the land, and therefore a release to a stranger or to a vendee after he has parted with his title, except where he is in privity by a covenant of warranty, will not be a bar of dower in favor of any one, *Harriman v. Gray*, 49 Me. 537; and see *Reiff v. Horst*, 55 Md. 42.

Consideration Supporting Release of Dower.

A consideration moving to the husband alone will be sufficient to support a release or renunciation of dower, *Bailey v. Litten*, 52 Ala. 282.

Release of Dower a Valid Consideration.

The release of her dower is, even as against creditors, a sufficient consideration for a deed of land in favor of the wife, *Singree v. Welch*, 32 Ohio St. 320; *Harvey v. Alexander*, 1 Rand. 219; *Ellinger v. Crowl*, 17 Md. 361; *Bullard v. Briggs*, 7 Pick. 533; *Dick v. Hamilton*, Deady 322; *Wright v. Stanard*, 2 Brock. 211; or a settlement upon her, *Hoot v. Sorrell*, 11 Ala.

386; *William and Mary College v. Powell*, 12 Gratt. 372; *Ward v. Crotty*, 4 Met. (Ky.) 59; *Taylor v. Moore*, 2 Rand. 563; or a promissory note given to her, *Caldwell v. Bower*, 17 Mo. 564; *Nims v. Bigelow*, 45 N. H. 343; *Motley v. Sawyer*, 38 Me. 68; and the difficulty of estimating the value of a dower right is so great that almost any consideration therefor, where fraud is not shown, will be sustained, *Singree v. Welch*, *Hoot v. Sorrell*, *Motley v. Sawyer*, *supra*. Where, however, the value of a settlement by a debtor upon his wife is grossly disproportionate to that of the dower released by the wife, such disproportion may be considered as evidence of fraud, and there are cases in which it is held, independently of the question of fraud, that where the value of the settlement upon the wife is proved to be in excess of the value of the dower released, the settlement will be voidable by existing creditors so far as the amount in excess of the value of the dower is concerned. See *Ward v. Crotty*, *supra*; *Garlick v. Strong*, 3 Paige 440; *Taylor v. Moore*, 2 Rand. 563; *William and Mary College v. Powell*, *supra*; *Patrick v. Patrick*, 77 Ill. 555.

Effect of Release of Dower.

Upon the question of the effect of the release of dower by joinder of the wife in the deed of the husband, the authorities are not united. In *Elmendorf v. Lockwood*, 4 Lans. 393, 57 N. Y. 322, it is held that the effect is to extinguish dower for all purposes whatever. On the other hand, it is held that the release acts by way of estoppel, and therefore takes effect only in favor of parties and privies, *French v. Lord*, 69 Me. 537; *French v. Crosby*, 61 Id. 502; *Kitzmiller v. Van Rensselaer*, 10 Ohio St. 63; *Robinson v. Bates*, 3 Met. 40; *Ridgway v. Masting*, 23 Ohio St. 294; and in *Littlefield v. Crocke*, 30 Me. 192, where a mortgage in which the wife had not joined was foreclosed, and after the execution of the mortgage the wife had joined in a release of dower to the assignee of the equity of redemption, it was held she was not barred as against the mortgagee; and see *McMahon v. Russell*, 17 Fla. 698. But in *Johnson v. Van Velsor*, 43 Mich. 109, where a wife joined in an absolute deed of property which had been mortgaged by her husband, and afterwards purchased the same property, it was held that in a suit on the mortgage she could not claim dower. In *McKee v. Brown*, 43 Ill. 130, one A. being charged with crime entered bail, and to secure his bondsmen he and his wife conveyed land to them. A. made default, his recognizance was forfeited, and to relieve the bailsmen the land was conveyed to the city, but the forfeiture of bail being claimed by the school commissioners, the Court ordered the deed for the land to be made to them; the wife was held estopped to claim dower as against their alienee.

Agreement to Release Dower.

An agreement to release dower is not equivalent to a release, *White v. White*, 1 Harr. (N. J.) 202.

Effect of Setting aside Deed in Fraud of Creditors.

Where the husband and wife unite in a deed to a third party in fraud of creditors, and the deed is afterwards set aside as fraudulent, the wife's right to dower will revive, *Summers v. Babb*, 13 Ill. 483; *Robinson v. Bates*, 3 Met. (Mass.) 40; *Lockett's Admr. v. James*, 8 Bush. 28; *Lowry v. Fisher*, 2 Id. 70; *Dugan v. Massey*, 6 Id. 81; *Woodworth v. Paige*, 5 Ohio St. 70; *Miller v. Wilson*, 15 Ohio 108; *Cox v. Wilder*, 2 Dillon 45 (reversing S. C. 5 N. B. R. 443); *Wyman v. Richardson*, 62 Me. 293; *Ridgway v. Masting*, 23 Ohio St. 294. The same is the case where a fraudulent settlement upon the wife is set aside, *Davidson v. Graves*, 1 Bail. Eq. 268; *Belford v. Crane*, 16 N. J. Eq. 265; this case overrules *Den ex d. Stewart v. Johnson*, 3 Harrison 87, unless the remarks of the chancellor in giving judgment, "No actual fraud is imputed to the wife. Her interest in the property as against her husband's creditors will be secured to her to the extent of the value of her dower," be regarded as showing an intention of the Court to make a distinction between a case in which a wife was merely a passive instrument and one in which she actually co-operated as a fraud. This distinction, it is submitted, is one which can hardly be maintained, and which we do not believe the learned chancellor intended to make.

In New York the law was for a time thought to be otherwise. See *Manhattan Co. v. Evertson*, 6 Paige 457; *Meyer v. Mohr*, 1 Robt. 333; and in *Maloney v. Horan*, 53 Barb. 29, the Supreme Court, in one of the departments, declared the law as follows: "When the deed of the husband has been avoided at the suit of the creditors, on the ground that it was made with intent to hinder, delay, or defraud them, there remains an estate in the fraudulent grantee which is sufficient to support or feed this estoppel, for the fraudulent deed is good as between the parties to it. . . . Whatever consequence may ensue from the proceedings of the creditors *in invitum*, for the enforcement of their remedy upon the estate fraudulently conveyed, is attributable to the statute which in conjunction with the decree acts directly upon such estate, and divests so much thereof only as may be necessary to obtain satisfaction of the claims of the creditors, and the wife's dower in that portion of the estate so divested will be as effectually barred as in the part which may remain vested in the fraudulent grantee. There cannot, in the nature of the case, be any severance, and so, if the whole estate be taken away, this results from the enforcement of the remedy and not because

the fraudulent deed conveyed nothing to the fraudulent grantee." The decision of the Supreme Court was reversed on appeal in 49 N. Y. 111. In giving judgment FOLGER, J., said: "A release of dower can be availed of, then, only by one who claims under the very title which was created by the conveyance with which the release of dower is joined. But when a creditor of the husband pursues him to judgment, and attacks as fraudulent and sets aside as void the deed from him, joining in which the wife has released her right of dower, he does not connect himself with the title which that deed has created, and with which the release of dower is connected. He sets up the title of the husband as it existed before the fraudulent conveyance, and stands in hostility to the title which it has given. Not being a party to the release, or in privity with it, he may not set it up in bar of dower."

To restore the right of dower, however, the fraudulent conveyance must be set aside; if left unattacked, the dower right is gone. Thus in *Cantrill v. Risk*, 7 Bush. 160, where the deed was not set aside, but was made to operate as an assignment for the benefit of creditors, the right of dower was held still barred, and in *Mann v. Edson*, 39 Me. 25, where the deed was made in fraud of creditors, and the husband took from the grantee a life lease, and remained in possession until his death, the wife was held barred of her dower.

And where the title is lost through the laches of the grantee, the deed not being set aside, the dower will still be barred, *Martin v. Noble*, 57 Ill. 176.

On the setting aside of a fraudulent deed, in which the wife did not join, but in which she had a contingent interest, which she asserted, she may still have her dower, *Blow v. Maynard*, 2 Leigh. 29; and see *Martin v. Lincoln*, 4 Lea 289; and even where the fraudulent deed has been made to the wife herself, and she has resisted its being set aside, and has not in proceedings to accomplish that end set up her dower, and it is nevertheless set aside, she may, notwithstanding, assert her rights, and obtain her dower in subsequent proceedings, *Humes v. Scruggs*, 64 Ala. 40.

Recovery against Husband for Defective Title.

Where the wife joins her husband in a conveyance, and the grantee afterwards recovers against the husband for a defect of title, the wife's dower is revived, *Stinson v. Sumner*, 9 Mass. 143.

Joinder in a Lease.

A joinder by a wife in a lease will bar her dower only to the extent of and during the continuance of the lease, *Chase's Case*, 1 Bland. 206.

Bar of Dower by the Adultery and Elopement of Wife.

By the statute of West. 2, cap. 34 (13 Edw. I., St. 1, c. 34), it is enacted that "if a wife willingly leave her husband and go away, and continue with her avouter, she shall be barred forever of action to demand her dower that she ought to have of her husband's land, if she be convicted thereupon, except that her husband willingly reconcile her, and suffer her to dwell with him, in which case she shall be restored to her action." See Co. Litt. 326.

This statute, or the law as stated by it, is practically in force in the greater number of the United States. In some it has been recognized as interwoven into the common law of the State, and in others its provisions have been, with slight variations, formally enacted. See *Bell v. Nealy*, 1 Bail. 312; *Heslop v. Heslop*, 82 Pa. St. 537; *Lecompte v. Wash*, 9 Mo. 551; Report of the Judges, 3 Binn. App. 606; *Cogswell v. Lippett*, 3 N. H. 41; *Shaffer v. Richardson's Admin.*, 27 Ind. 122; Ohio, Rev. St., § 4192, p. 1051; South Carolina, Pt. 2, Tit. 1, Ch. 83, § 11, p. 431; West Virginia, Rev. St., C. 70, § 7, p. 500; Virginia, Code, 1873, Tit. 31, Ch. 106, § 7, p. 854; Illinois, Rev. St., Ch. 41, § 15, p. 427; Kentucky, Gen. St., Ch. 52, Art. IV., § 3; Georgia, Code, 1873, Pt. 2, Tit. 2, Ch. 1, Art. 2, § 1764; Delaware, Rev. St. 1874, Ch. 87, § 9; North Carolina, Bat. Rev., Ch. 37, § 16, p. 367. In Virginia and Delaware the statutes also deprive the wife of her dower where she deserts the husband, and the desertion is not occasioned by his fault. In Virginia, the fault must be such as would justify an application by the wife for a divorce, *supra*. In North Carolina, the wife's misconduct will not deprive her of her dower unless the husband has begun proceedings for divorce. The statute, West. 2, Cap. 34, was in force in New York until the adoption of the Revised Statutes of 1830, *Reynolds v. Reynolds*, 24 Wend. 193.

The essential parts of the offence which causes the wife to lose her dower, are the adultery and the willing departure from the husband, or continuance with the adulterer. These the Supreme Court of North Carolina in *Walters v. Jordan*, 13 Ired. Law 361, a case decided before the passage of the law mentioned above, considered so essential that it would suffer no one of them to be supplied by construction. RUFFIN, C. J., said, "The adultery need not be before leaving the husband or elopement with the adulterer, and she may be carried away, and afterwards remain away in adultery, and there will be a bar; but if the husband find his wife in adultery and drive her away, she does not lose her dower, for there must be a willing leaving within the words of the statute." In this, NASH, J., concurred, but PEARSON, J., dissenting, thought that her going away under such circumstances, should be considered a voluntary one, since the expulsion was

a natural consequence of her misconduct, and should have been foreseen by the wife.

The opinion of PEARSON, J., would seem more consonant to reason and equity than that of the majority of the Court, and it was held in *Stegall v. Stegall's Admr.*, 2 Brock (U.S.) 256, that any separation was voluntary which was not brought about by the husband, or by constraint of the wife's person. In that case, a husband wished his wife to leave her father's home, where she was living; she refused, and the husband left her, and she afterwards married another man. She was held to have forfeited her dower.

Where the husband by his ill-treatment, as by personal abuse, or by his infidelity to the marriage relation, forces his wife to leave him, or wilfully deserts her, the widow's dower is not barred, although she afterwards yield to temptation and commit adultery, *Rawlins v. Buttel*, 1 Houst. 224; *Heslop v. Heslop*, 82 Pa. St. 537; *Reel v. Elder*, 62 Id. 308. In New York, the bar was held to rest upon the living apart from the husband, and not upon the circumstances of the elopement, and that, therefore, the Court would not take into consideration the provocation received by the wife, *Reynolds v. Reynolds*, 24 Wend. 193, and this seems in accord with the English law upon the subject, *Woodward v. Dowse*, 10 C. B. (N.S.) 722; *Bostock v. Smith*, 34 Beav. 57.

If the husband, after having forced his wife to leave, invites her to return and she refuses to come, her dower is barred, *Bell v. Nealy*, 1 Bail. 312.

The elopement need not be with the adulterer, *Reel v. Elder*, 62 Pa. St. 308; and where the adultery is committed while the wife and husband are living apart by the consent of the latter, her dower will be barred, *McAlister v. Nonenger*, 54 Mo. 251. In Indiana it is held that the mere absence of the wife from the husband, unaccompanied by adultery on her part, will not deprive her of her right in her husband's land, *Wiseman v. Wiseman*, 73 Ind. 112.

The statute of West. 2, c. 34, is not in force, nor has its spirit been introduced into the laws of Massachusetts, *Lakin v. Lakin*, 2 Allen 45; Rhode Island, *Bryan v. Batcheller*, 6 R. I. 543; Iowa, *Smith v. Woodworth*, 4 Dillon 584. The reason generally assigned being that, as under the laws of this country, a divorce *a vinculo matrimonii* could be obtained, on account of the adultery of the wife, which divorce would be an effectual bar to dower, there did not exist the same reason for constituting the elopement and adultery, not followed by a divorce; such a bar as in England where, under the common law, a divorce *a vinculo matrimonii* could be obtained only for causes antecedent to the marriage.

In Maine, in the case of *Littlefield v. Paul*, 69 Me. 527, the Supreme

Court doubted whether the statute had ever been in force in that State, and held that even if it had, it had been undoubtedly supplied by Rev. St., Ch. 60, §§ 7, 8; Ch. 103, §§ 1, 6, 7, 8, 9, 10, and that, therefore, adultery would not of itself bar the wife's dower.

In New York, the statute has not been in force since 1830; see *Schiffer v. Pruden*, 64 N. Y. 47; *Reynolds v. Reynolds*, 24 Wend. 193.

In Minnesota, before the abolition of dower, it was forfeited if the wife deserted her husband, and it was held that where, by the judgment of a court, the husband was to pay to the wife a sum for a separate maintenance, such a judgment was an implied authority to the wife to live separate from her husband, and would preserve her dower, *Weed v. Weed*, 27 Minn. 330.

In Maryland, dower is forfeited by bigamy of the wife, Rev. Code, Tit. 27, Art. 72, § 102, p. 807.

Effect of Divorce.

A divorce *a vinculo matrimonii* will bar dower in some States irrespectively of the cause for which it is obtained, or whether the husband or wife is the moving party in the divorce proceedings, *Calame v. Calame*, 24 N. J. Eq. 440; *Whitsell v. Mills*, 6 Ind. 229; *Gleason v. Emerson*, 51 N. H. 405; *Millimore v. Millimore*, 40 Pa. St. 151; in others only where the divorce is on account of the misconduct of the wife; in some, when the decree is against the wife, generally, and, in others, when it is for specified causes.

It will be a bar for the fault of the wife, generally, in Arkansas, Rev. St., Ch. XLIV., § 2217; Missouri, Rev. St., Vol. 1, Ch. 29, § 2198; New York, Rev. St. (1882), Ch. 1, Tit. III., § 8, p. 2197; Illinois, Rev. St., Ch. 41, § 14, p. 427; North Carolina, Bat. Rev., Ch. 37, § 14, p. 366; Ohio, Rev. St. (1880), Ch. 2, Tit. IV., Ch. 4, § 4192, p. 1051; (but not when the divorce has been granted in another State, *Mansfield v. McIntyre*, 10 Ohio 27;) and, therefore, where the divorce is for the fault of the husband, the wife may still have her dower, Illinois, R. S., Ch. 41, § 14, p. 427; Missouri, Rev. St., Vol. 1, Ch. 29, § 2198; *Hunt v. Thompson*, 61 Mo. 148; *Forrest v. Forrest*, 6 Duer 102. This last case overruled a dictum of McCoun, V. C., in *Day v. West*, 2 Edw. 592, to the effect that a divorce *per se* would bar the widow's dower, irrespective of her guilt or innocence. *Forrest v. Forrest* was affirmed in *Wait v. Wait*, 4 Comst. 95, in which case the Court of Appeals reversed the decision of the Supreme Court in 4 Barb. 192, and quoted with approbation the dissenting opinion of WILLARD, J., in the Court below.

The reason given for upholding the widow's claim of dower after the divorce granted for the husband's fault, and therein differing from the com-

mon law of England, was that, as at common law, a divorce *a vinculo matrimonii* could be obtained only for causes antecedent to the marriage, and, therefore, rendered the marriage void *ab initio*, while in New York (and it may be added in the United States, generally) a divorce might be obtained for causes subsequent, it would be contrary to the analogy of the law to permit the crime of one party to work a forfeiture of the rights of another, and especially when that other was the injured person. This doctrine is held even when the divorce is accompanied by an order of the Court for the maintenance of the wife, *Wait v. Wait*, *supra*; *Savage v. Crill*, 26 N. Y. S. C. 4.

In Connecticut, the statute, Gen. St., Tit. 18, Ch. 11, Art. 4, § 1, p. 376; provides that where the wife is the innocent party in a divorce proceeding, and no part of the husband's estate is assigned for her support, she can have her dower. Under this statute, in a case where the wife, having begun proceedings in divorce, entered into an agreement with the husband to take no alimony in consideration of his making no resistance to a decree of divorce, it was held that the wife might still claim dower, for the contract was void as between husband and wife, and the Court also intimated it might also be held void as against public policy being to promote divorce, *Stilson v. Stilson*, 46 Conn. 15.

In Georgia, when a decree for permanent alimony accompanies the divorce, dower will be barred, *Stewart v. Stewart*, 43 Ga. 294, Code (1873), Pt. 2, Tit. 2, Ch. 1, Art. 1, § 1742.

In Alabama, a divorce for adultery, on the part of the wife, will bar her dower, Code (1876), Pt. 2, Tit. 5, Ch. 1, Art. 2, § 2698.

In Massachusetts, the law provides that there shall be no dower given after a divorce, except when the decree is on account of the husband's adultery, or his being sentenced to be confined at hard labor, in which case the wife shall have her dower immediately, as though the husband were dead, Sts., Ch. 146, § 28, p. 816.

This dower will include all lands owned by the husband during coverture, *Davol v. Howland*, 14 Mass. 219.

In Rhode Island, upon a decree of divorce, based on a crime of the husband, dower will be given to the wife in the lifetime of the husband, Gen. Sts., Tit. XX., Ch. 167, § 7, p. 426.

The Maine statute, Tit. V., Ch. 60, § 7, p. 488, is to the same effect, except that its operation extends to all cases of divorce for fault of the husband, except when the cause is impotence, *Lewis v. Meserve*, 61 Me. 374. The statute has no retroactive force, so as to give dower in lands aliened by the husband before the passage of the act, *Given v. Marr*, 27 Me. 221; a decree obtained by the husband will bar the wife's claim of dower abso-

lutely, and if she afterwards obtain a decree against him, it will not revive her right, *Stilphin v. Hondlette*, 60 Me. 447.

In Wisconsin, where a marriage is dissolved by the sentence of the husband to imprisonment for life, R. S., Tit. 23, Ch. 109, § 2373, p. 665; in Michigan, Comp. Laws, Tit. 38, Ch. 170, § 4756, p. 1469, and Nebraska, Comp. Laws, Ch. 25, § 23, p. 254, if the husband is so sentenced, or if a divorce be granted on account of the adultery or drunkenness of the husband, or on account of his being sentenced to prison for a term of two years or more, the wife becomes entitled to dower as though he were dead.

In Missouri, in the case of *Hunt v. Thompson*, 61 Mo. 148, it was argued that the act of that State, with reference to dower, had the same effect as those in the States immediately above mentioned; but the Court held that the act merely saved the widow's dower, leaving it to become consummate on the death of the husband; the act applies when the divorce has been granted in another State, *Gould v. Crow*, 57 Mo. 200.

In Ohio, where the wife's dower is saved on a decree of divorce for the fault of the husband, it was held that if, after the divorce, the wife remarried, she would not be entitled to dower in the estate of her first husband on his death, the ground being that she would not then answer the description of the widow of the first husband, *Rice v. Lumley*, 10 Ohio St. 596.

The law in Ohio is now, however, different. In *Lamkin v. Knapp*, 20 Ohio St. 454, decided under an act passed in 1840, which, in case of a divorce, gave dower to the innocent wife, who *survived* her husband, it was decided that the subsequent marriage would not defeat the dower right, DAY, J., saying: "The subsequent marriage is lawful; why then should it have any more effect on her right of dower than the marriage of a widow? The right in either case is a vested right, contingent, as to the former, it is true, but it becomes absolute only by her survivorship;" and the Court distinguished the case from *Rice v. Lumley*, on the ground that that case was decided under the Act of 1824, which was silent as to dower in such case.

A legislative divorce, made with the assent of both parties, and by which a certain sum is to be paid to the wife, is as effective a bar as a decree of divorce by the courts, *Cabell v. Cabell's Admr.*, 1 Met. (Ky.) 319.

A divorce *a mensa et thoro* will not be a bar to dower, although alimony is granted, for it is a mere suspension of the marriage relation for the protection of the injured party, *Day v. West*, 2 Edw. 592; *Rich v. Rich*, 7 Bush. 53.

Statute of Limitations—Effect upon Dower.

After the death of the husband, it is generally held that, in the absence of special mention, the widow's claim for dower is not within the statute

of limitations, *Barksdale v. Garrett*, 64 Ala. 277; *Ridgeway v. McAlpine*, 31 Id. 458; *Barnard v. Edwards*, 4 N. H. 107; for the reason, generally given, that the widow has no power to enter upon her dower lands before assignment (see *infra*, though the power is given to her in some States), and that the right of action does not arise from any right of possession adverse to that of the heir or feoffee, the widow's right not being adverse. In some cases the widow has been held as in possession, in contemplation of law, from the death of her husband, *May v. Rumney*, 1 Mich. 1; *Wells v. O'Beall*, 2 G. & J. 468; *Spencer v. Weston*, 1 Dev. & Bat. 213; *Guthrie v. Owen*, 10 Yerg. 123; *Ralls v. Hughes*, 1 Dana 407; *Tooke v. Hardeman*, 7 Ga. 20; *Chapman v. Schroeder*, 10 Id. 321.

The law, however, is held otherwise in Iowa, where the statute will run in favor of the heir or his assignee from the time that he denies the right of the dowress, or does some act equivalent to such a denial, *Sully v. Nebergall*, 30 Iowa 339; *Rice v. Nelson*, 27 Id. 148; but the right of dower will not be barred by a mere lapse of time without adverse possession, *Berry v. Furhman*, 30 Iowa 462; *Felch v. Finch*, 52 Id. 563; in Pennsylvania, where the statute will run from the time that the vendee, after the death of the vendor has, by some unmistakable act or declaration, asserted an adverse right and claimed ownership, *Care v. Keller*, 77 Pa. St. 487; in Kentucky, where the statute is held to run from the time of the husband's death, *Kinsolving v. Pierce*, 18 B. Mon. 782; in South Carolina, where the statute runs in favor of the purchaser, but not in favor of the heir, *Boyle v. Rowand*, 3 Desau. 555, and note; *Lide v. Reynolds*, 1 Brev. 76; *Mitchell v. Poyas*, 1 N. & M. 85; in Arkansas, see *Livingston v. Cochran*, 33 Ark. 294; in Tennessee, *Carmichael v. Carmichael*, 5 Humph. 96; in Maine, *Durham v. Angier*, 20 Me. 242; and in Illinois, where it runs from the accrual of a right of action for dower, but the laches of the husband can in no respect affect the wife's right, *Steele v. Gellatly*, 41 Ill. 39.

Statutes of limitation, with especial reference to dower, have been enacted in Massachusetts, where the period within which action must be brought is twenty years from the husband's death, Pub. St. (1882), c. 124, § 14, p. 742; Georgia, where the term is seven years, Code (1873), Pt. 2, Tit. 2, Ch. 1, Art. 2, § 1764; New York, twenty years, Rev. St. (1882), Pt. 2, c. 1, Tit. 3, § 18, p. 2199; Alabama, as in favor of the husband's alienee, or one claiming under him, three years, Code (1876), Pt. 2, Tit. 3, Ch. 2, Art. 2, § 2251, p. 581. Under the Code, an assignee in bankruptcy is not such an alienee, *Humes v. Scruggs*, 64 Ala. 40.

Stale Claims.

The rule of stale claims applies to claims for dower, *Ralls v. Hughes*, 1 Dana 407; *Barnard v. Edwards*, 4 N. H. 107. In the latter case a widow, whose husband died in 1797, made no claim until 1826; the jury was allowed to consider the great length of time which had elapsed between the accrual of the right and its assertion as evidence of a release of the right of dower, although the widow had remarried in 1798, and had continued a feme covert and a non-resident of New Hampshire ever after.

No Presumption of Release of Dower from Adverse Possession in Husband's Lifetime.

No presumption of a release of dower can arise from long continued possession adverse to the husband in his lifetime, *Durham v. Angier*, 20 Me. 242.

Bar by Sale for Decedent's Debts.

In those States where land is assets for the payment of a decedent's debts, a sale for such debts, with such notice to the widow as is required by statute or otherwise, will effectually bar dower in the lands sold, *Cockrill v. Armstrong*, 31 Ark. 580; *Olmsted v. Blair*, 45 Iowa 42; *Garvin v. Hatcher*, 39 Id. 685.

And where land has been, under an order of Court, improperly sold as free from dower, it has been held that the widow may be put to her election between her dower and her proportion of the avails of the sale, *Sweesey v. Shady*, 22 Ohio St. 333.

Widow Estopped to Claim Dower.

The widow may, by her actions after her husband's death, estop herself from claiming dower, as by being present at a sale of the realty by the administrator, and stating that the sale would be made free of dower, *Sweaney v. Mallory*, 62 Mo. 485; or, it has been held, by simply standing by and allowing persons to bid upon the property, the presumption being that the widow knows her rights and by her silence waives them, *Smith v. Wright*, 2 Ohio 506; but the reverse was held in *Smith v. Paysenger*, 2 Mills. Const. R. 59, the Court considering that there was no such presumption; and in *Phinney v. Johnson*, 13 S. Car. 25, the widow was held not barred, though, in addition to standing by while a sheriff's sale was made for the debts of her husband, she allowed the purchasers to make improvements, the Court being of opinion that the purchasers must be presumed to know

the title they held; and see also *Toledo, Peoria, and Warsaw R. W. Co. v. Curtinius*, 65 Ill. 120, where the sale was made by order of Court.

The widow is not estopped from claiming her dower by merely selling as executrix the land of her husband for the payment of his debts, although she do not expressly reserve her dower, *Sip v. Lawback*, 2 Harris (N. J.) 442; but if, acting in such capacity, she sell the land under an order of Court, the terms of which direct a clear title to be made, and the purchaser pay the full value of the land, she will be estopped as against the vendee and his assignee, *Dougrey v. Topping*, 4 Paige 94; a like estoppel arises when the sale is made with warranty, *Magee v. Mellon*, 23 Miss. 585.

The widow may estop herself by an agreement with the heir, upon proper consideration, *Shotwell v. Sedam's Heirs*, 3 Ohio 5; but she is not estopped by the fact that, prior to an assignment of dower, she enjoyed the assets of her husband's estate to an amount in excess of a legal dower, and wasted said assets, *Kenan v. Johnson*, 48 Ga. 28.

She may also be estopped by her laches; thus in *Gilbert v. Reynolds*, 51 Ill. 513, the widow was held estopped under the following circumstances: A husband and wife were in 1834 living apart; in that year the former obtained a divorce, but the wife did not know of it until 1854; in the same year in which he had been divorced, the husband remarried and moved to the State of Illinois, where he died in 1863, having sold certain land. In 1869, the widow, the first wife, claimed dower in said land, but was held barred by her long silence. The widow may also be estopped by a ratification after her husband's death of acts which, while covert, were not sufficient to bar her dower, *Reed v. Morrison*, 12 S. & R. 18; *Stoddart v. Outcompts*, 41 Iowa, 329.

Right of Widow after Husband's Death and before Assignment of Dower.

Although the right of dower becomes consummate immediately upon the husband's death, *Price v. Johnston*, 4 Yeates 526, yet, before the dower is actually assigned, the widow's position is a somewhat anomalous one; for while the assignment does not create the dower, *Matlock v. Lee*, 9 Ind. 298, yet it ascertains the portion of the land which she is to hold for her dower, *Whyte v. Mayor and Aldermen of Nashville*, 2 Swan. 364; and until assignment, the widow does not reap the fruits of her estate.

Before assignment, it has been characterized as a mere right or chose in action, *Strong v. Bragg*, 7 Blackf. 62; *Rayner v. Lee*, 20 Mich. 384; *Weaver v. Sturtevant*, 12 R. I. 537; *Hossie v. Ellis*, 4 Id. 123; the widow has before assignment no right of entry, *Shields v. Balts*, 5 J. J. Mar. 13;

Wyman v. Richardson, 62 Me. 293; *Bolster v. Cushman*, 34 Id. 428; *May v. Rumney*, 1 Mich. 1; *Sharpley v. Jones*, 5 Harring. 373; *Hilleary v. Hilleary's Lessee*, 26 Md. 274; *Barksdale v. Garrett*, 64 Ala. 277; *Weaver v. Crenshaw*, 6 Id. 873 (*aliter* in Vermont, *Grant v. Parham*, 15 Vt. 649; Connecticut, where before assignment the widow holds as tenant in common with the heirs, *Stedman v. Fortune*, 5 Conn. 462; *Wooster v. Hunts & Lyman Iron Co.*, 38 Id. 256; and Michigan, *Proctor v. Bigelow*, 38 Mich. 282; *Moody v. Seaman*, 46 Id. 74;) and cannot maintain a possessory action, *Tooke v. Hardeman*, 7 Ga. 20; and if she obtain possession, it is by right of quarantine only, *Shields v. Batts*, *supra*; *Weaver v. Crenshaw*, 6 Ala. 873; *Blodget v. Brent*, 3 Cr. Cir. 394; and if an ejectment or writ of equity should be brought against her, she cannot defend by virtue of her unassigned dower, *Hildreth v. Thompson*, 16 Mass. 191; *Cavender v. Smith*, 8 Iowa 360; but in *Den ex d. Halsey v. Dodd*, 1 Hals. 367, the Court thought otherwise, and quoted with approbation the dictum of GOULD, J., in *Goodlitle v. Newman*, 3 Wils. 516. "If dower be not assigned to her within forty days, may she not continue until it be assigned? I think the Court would not turn her out until dower was assigned." But see *Jackson v. O'Donaghy*, 7 Johns. 247.

Before assignment, the widow's dower is not seizable in execution, *Gooch v. Atkins*, 14 Mass. 378; *Crittenden v. Woodruff*, 14 Ark. 465; *Pennington v. Yell*, 11 Id. 236; *Torrey v. Minor*, 1 S. & M., Ch. 489; *Summers v. Babb*, 13 Ill. 483; *Rausch v. Moore*, 48 Iowa 611; *Doe ex d. Cook v. Webb*, 18 Ala. 814 (*aliter* in Connecticut, *Greathead's Appeal*, 42 Conn. 374), and a sale on execution will not be validated by a subsequent assignment, *Shields v. Batts*, *supra*; but where the widow is in possession, her dower may be reached by a creditor's bill, *Tompkins v. Fonda*, 4 Paige 448; *Stewart v. McMartin*, 5 Barb. 438. *Davison v. Whittlesey*, 1 McAr. 165, goes further, and declares unassigned dower subject generally, in equity, to debts contracted by the widow after her husband's death, and that where the dower cannot be assigned by metes and bounds, a receiver will be appointed; and that unassigned dower is liable generally in equity for the widow's debts has lately been declared to be the law in New York. In *Payne v. Becker*, 29 N. Y. S. C. 28, the Supreme Court held that an assignment of an unassigned dower, executed by a widow under compulsory process, to a receiver would not authorize the receiver to proceed to have the dower ad-measured; but the Court of Appeals, in 87 N. Y. 154, reversed this decision, and said, "It must now be deemed settled that upon the death of the husband, a widow has an absolute right to dower in the lands of which he had been seized, and that this right, or interest, although resting in action, is liable in equity for her debts."

Before assignment, the widow is not liable for taxes, *Branson v. Yancy*, 1 Dev. Eq. 77; *Felch v. Finch*, 52 Iowa 563; she may, if in possession, take the crops and account to the heirs for their share thereof, *Laird v. Wilson*, Penning. 281; but she has no power to make a lease, *Croade v. Ingraham*, 13 Peck. 33; or exercise other acts of ordinary dominion over the land, *Webb v. Boyle*, 63 N. C. 271; *Lamar v. Scott*, 4 Rich. 516; and in case of proceedings for partition, she need not be made a party, *Hoxsie v. Ellis*, 4 R. I. 123.

Before assignment, the widow has no power to convey her dower so as to vest a right of action in the grantee, *Blain v. Harrison*, 11 Ill. 384; *Jackson ex d. Clowes v. Vanderheyden*, 17 Johns. 167; *Jackson ex d. Totten v. Aspell*, 20 Id. 411; *Green v. Putnam*, 1 Barb. 500; *Jackoway v. McGarrah*, 21 Ark. 347; *Carnall v. Wilson*, Id. 62; *Jacks v. Dyer*, 31 Id. 334; *Saltmarsh v. Smith*, 32 Ala. 404; *Wallace v. Hall's Heirs*, 19 Id. 367; *Cox v. Jagger*, 2 Cow. 644; *Summers v. Babb*, 13 Ill. 483; but she may release her right to the owner of the fee, *Reed v. Ash*, 30 Ark. 775; *Summers v. Babb*, *Green v. Putnam*, *supra*; or to the heir, *Matlock v. Lee*, 9 Ind. 298; *Strong v. Bragg*, 7 Blackf. 62; *Malin v. Coult*, 4 Ind. 535; and a release to the heir, although he is not in possession, will not be champertous, *Ross v. Blair*, Meigs 525; or to the equitable owner of the fee, *Bailey v. West*, 41 Ill. 290; or to the purchaser of the fee, although the contract of purchase is still unexecuted, *Chicago Dock Co. v. Kinzie*, 49 Ill. 289; or to one who, by covenants of warranty, is in privity with the owner of the fee, *La Framboise v. Grow*, 56 Ill. 197; and see *Robbins v. Kinzie*, 45 Id. 354.

Although the widow cannot convey her dower before assignment, yet, under some circumstances, a contract made by her with reference to such a conveyance may be enforced in equity, *Potter v. Everitt*, 7 Ired. Eq. 152; and it has even been held that her alienee may be protected at law by being allowed to sue in the name of the widow, *Lamar v. Scott*, 4 Rich. 506.

In *Grant v. Parham*, 15 Vt. 649, the question was as to the effect of a quit-claim deed given by the widow before the assignment of her dower, and the Court, without giving any opinion as to the general rule of the widow's inability as above stated, held that by such a deed the widow might bar herself; as, however, in Vermont the widow has a right of entry before assignment, this case cannot be considered as authority upon the general question.

Assignment of Dower.

An assignment of dower should be made before any sale of the realty for the deceased husband's debts, *Laidley v. Kline*, 8 W. Va. 218. It

should be made by the heir, or by him who is tenant of the land, Co. Lit. 346.

This duty of the heir is recognized by statute in Arkansas, Rev. St., Ch. XLIX., § 2239; Illinois, Rev. St. (1880), Ch. 41, § 18, p. 427; Ohio, Rev. St., Pt. 3, Tit. 1, Div. 7, Ch. 7, §§ 5703, 5707, p. 1383; Rhode Island, Rev. St., Tit. 29, Ch. 229, § 4, p. 637; Massachusetts, Pub. St. (1882), Ch. 124, § 16, p. 742.

If the heir is a minor, the assignment may be made by his guardian, *Jones v. Brewer*, 1 Pick. 314; *Curtis v. Hobart*, 41 Me. 230; *Young v. Tarbell*, 37 Id. 509; Illinois, Rev. St., Ch. 41, § 43, p. 429; Arkansas, Rev. St., Ch. XLIX., § 2241. In Michigan, the guardian of a spendthrift may assign for him, Comp. Laws, Vol. 2, Tit. 28, Ch. 172, § 4833, p. 1484.

An assignment may be made by parol, notwithstanding the statute of frauds, for the widow does not derive any estate from the assignment; she already holds an estate by the operation of the law, and needs only to have the land she is to occupy distinguished from the rest of her late husband's estate by being separated therefrom, and this may be done as well by the physical act of setting it out by metes and bounds, as by deed, *Johnson v. Neil*, 4 Ala. 166; *Meserve v. Meserve*, 19 N. H. 240; *Pinkham v. Gear*, 3 Id. 163; *Conant v. Little*, 1 Pick. 189; *Shattuck v. Gragg*, 23 Id. 88; *Curtis v. Hobart*, 41 Me. 230; but the assignment must be accepted by the widow to render it binding, *Johnson v. Morse*, 2 N. H. 48; and a mere agreement, although in writing, signed by the heirs and not by the widow, that in consideration of the use of the entire estate of the husband by his heirs, the widow may have the occupancy of a certain part thereof, together with certain farm stock, and that she shall have a certain yearly payment from the heirs, will not amount to an assignment. In *McLeery v. McLeery*, 65 Me. 172, where the facts were as above, the Court said: "Nor could it (the paper) operate as an assignment to her of her dower. A portion of the consideration to her in the agreement consists of the executory promises of the sons, which may never be fulfilled. The agreement (not signed by her) merely related to 'the use and income' of her dower by the sons until set out to her. It operated only to suspend her claim for a time."

If the heir or owner of the fee does not assign dower, the widow may then apply to the proper authority, and have dower assigned by it. In England, the assignment, under such circumstances, is made by the sheriff, but in this country, under various acts, the place of the sheriff is generally supplied by commissioners appointed by the Court; see *Scott v. Scott*, 1 Bay 504; and it may be noted that, except where the statutory method is made by legislative authority, exclusive of all others, the common-law system of assignment may still be pursued, *Johnson v. Neil*, 4 Ala. 166; *Moore v.*

Waller, 2 Rand. 421; *Sutton v. Burrows*, 2 Murph. 81; *Gibbs v. Esty*, 29 N. Y. S. C. 266; *Rutherford v. Graham*, 9 Id. 796.

Before proceeding to have dower adversely assigned, the widow must make a demand for dower upon the person bound to assign it, primarily, the person seized of the freehold, either as heir or by conveyance from the husband, *Hunt v. Hotchkiss*, 64 Me. 241. In *Cook v. Walker*, 70 Me. 232, it was held that where the wife is entitled to dower in lands held in common, the demand must be made upon the person holding the husband's title, and not upon his cotenant. A demand upon the tenant of a non-resident owner, *Stevens v. Rollingsford Savings Bank*, 70 Me. 180, or upon his agent to collect rents, *Hunt v. Hotchkiss*, *supra*, has been held good under a statute which accords with the common law on the subject of demand. In New York, a demand is not necessary before proceeding to recover dower, *Jackson ex d. Loucks v. Churchill*, 7 Cow. 287.

The demand may be by parol, *Page v. Page*, 6 Cush. 196; *Baker v. Baker*, 4 Greenl. 67; *Curtis v. Hobart*, 41 Me. 230, or made by one authorized by parol, *Luce v. Stubbs*, 35 Me. 92; *Lothrop v. Foster*, 51 Id. 367.

In New Hampshire, however, the demand must be in writing, Stats. (1878), Ch. 246, § 2, p. 566.

How Dower should be Assigned.

Dower should be assigned by metes and bounds, *Pierce v. Williams*, Penning. 709; *Smith v. Smith*, 6 Lans. 313; and where it is to be assigned in a tenancy in common, partition should be made before assignment, *Walker v. Walker*, 6 Cold. 571; but an assignment may be made without partition, *Ross v. Wilson*, 58 Ga. 249; *Smith v. Smith*, 6 Lans. 313.

A room, or a portion of a building, may be assigned for dower, *Den ex d. Miller v. Miller*, 1 South. 321; *White v. Story*, 2 Hill 543; *Stewart v. Smith*, 39 Barb. 167 (reversed in 1 Keyes 59, but not upon this point); but if dower be assigned in a building in such a manner as to render it practically useless, the assignment will be set aside as bad, *Stewart v. Smith*, 4 Abb. App. 306; and the remarks of BRONSON, J., in *White v. Story*, *supra*, would indicate that the widow's assent was necessary to render the assignment of a room valid.

Where an assignment is made by the sheriff, or by commissioners, the return should be definite. In *Pierce v. Williams*, Penning. 709, the Court said: "It ought to describe the part allotted to the widow by metes and bounds, whenever the subject-matter is capable of being so described, and a particular end of a house or barn, or a third of an orchard, will not do."

But in *Den ex d. Miller v. Miller*, *supra*, the assignment of "one-third" of a building was held good, and in *Patch v. Keeler*, 27 Vt. 252, the assignment of "the three west rows of apple-trees on the west side of the orchard, running north and south, in the centre, between the third and fourth rows," was held sufficient.

Where the character of the property in which dower is to be assigned is such that it is impossible to set it off by metes and bounds, dower may be assigned by giving the widow one-third of the net rents and profits of the land or of its yearly value, *Walsh v. Reis*, 50 Ill. 447; Michigan, Comp. Laws, Vol. 2, Tit. XXII, Ch. CLI, § 4279, p. 1361; Wisconsin, Rev. St., Pt. 2, Tit. 29, Ch. 166, § 3871, p. 953; Nebraska, Comp. Stat., Ch. 23, § 10; Oregon, Stats., Ch. 17, Tit. 1, § 11, p. 585; Ohio, Tit. 1, Div. 7, Ch. 7, § 5714, p. 1384; Rhode Island, Stats., Ch. 229, § 2, p. 637; South Carolina, Rev. (1873), Pt. 3, Tit. 3, Ch. 113, p. 530; Vermont, Gen. Laws, Tit. 15, Ch. 114, § 2223, p. 451; Missouri, Rev. St., Vol. 1, §§ 2215, 2216, p. 368; New Hampshire, Gen. Stat. (1878), Ch. 202, § 4, p. 474; Arkansas, Rev. St., Ch. CII, § 4339, p. 777; Maine, Rev. St. (1871), Tit. IX., Ch. 103, § 3, p. 757; Massachusetts, Pub. Stats. (1882), Pt. 2, Tit. 1, Ch. 124, § 11, p. 742; or by assigning to the widow a sum of money which, if all consent, may be a sum in gross; but the widow is not compellable to take the sum in gross, and may insist upon having secured to her an annual sum, or on being endowed of the rents and profits, *Summers v. Donnell*, 7 Heisk. 565; and the true measure of the sum to be secured to the widow is the annual value of the land, less repairs, taxes, and other necessary and recurrent expenses; and the question, in fixing the amount, is not whether the property is used or is unproductive, but what is the yearly value of the property if used, or permitted to be used, for the purposes to which it is peculiarly adapted, *Riley v. Clamorgan*, 15 Mo. 331, as explained in *Reily v. Bates*, 40 Id. 468. No deduction should be made for insurance or water rent, *Hillgartner v. Gebhart*, 25 Ohio St. 557; for the widow as a life tenant would be under no obligation to insure the buildings, if actually held by her; see *ante*, p. 211; or to use water within them.

To render an assignment of money in lieu of the land itself valid, the commissioners must certify that it was impossible to assign dower otherwise without doing injustice or ruining the property, *Heyward v. Outhbert*, 3 Brev. 482. When the assignment is made of the annual value, as above stated, the amount cannot be varied by subsequent events affecting the value of the property; but when the assignment is of one-third of the rents and profits, the amount will vary from time to time, *Walker v. Walker*, 5 Bradw. 289; and see *Donoghue v. Chicago*, 57 Ill. 235.

The consent of all parties in interest is necessary to render the assign-

ment of a sum in gross valid, *Harrison's Exrs. v. Payne*, 32 Gratt. 387; *Cook's Exr. v. Cook's Admr.*, 20 N. J. Eq. 375.

Where the husband's realty consists of several distinct parcels of land, dower should be assigned in each parcel separately, *Schnebly v. Schnebly*, 26 Ill. 116; *Wood v. Lee*, 5 T. B. Mon. 50; *Scott v. Scott*, 1 Bay 504; *Coulter v. Holland*, 2 Harring. 330; *Sip v. Lawback*, 2 Harris. (N. J.) 442; *French v. Pratt*, 27 Me. 381; *In the Matter of Anne Garrison*, 2 McCart. 393; especially where dower is sought in lands which have been conveyed by the husband, *Thomas v. Hesse*, 34 Mo. 13. Dower so assigned is called dower according to common right.

Where, however, it can be done without injury to third persons, as where all the parcels belong to one person, or the husband has died seized of all his lands, and such an assignment can be made without injury to devisees, dower against common right may be given; that is, the widow may receive in one solid piece, land of the same value as she would have received if the third of each tract owned by her husband had been assigned to her; but for such endowment the widow's assent is absolutely necessary, *French v. Pratt*, 27 Me. 381; *Montgomery v. Horn*, 46 Iowa 285; *Alderson's Heirs v. Henderson & Co.*, 5 W. Va. 182.

Dower in solido, if we may so call it, has been provided for by statute in Kentucky, Gen. St., Ch. 52, § 11, p. 531; Tennessee, Sts. (T. & S. 1871), Pt. 2, Tit. 3, Ch. 3, § 2403; Rhode Island, Sts., Tit. 29, Ch. 229, § 3, p. 637, and Georgia, Code 1873, Pt. 2, Tit. 2, Ch. 1, Art. 1, §§ 1766, 1767; in the last-named State the right to make such assignment is limited to cases in which all the lands lie in one county.

When an assignment against common right is avoided, all parties are restored to their original positions, *French v. Peters*, 33 Me. 396.

If the husband conveys his land in portions and then dies, the dower must be assigned out of each portion; and this is also the case when land, conveyed by the husband as a single tract, has been subdivided by subsequent conveyances, *Fosdick v. Gooding*, 1 Me. 30; *Boyd v. Carlton*, 69 Me. 200.

Where the husband has aliened some of his land and retained some, the dower, if possible, should be assigned out of the retained portion, *Lawson v. Morton*, 6 Dana 471; *Morgan v. Conn*, 3 Bush. 58; in *Wood v. Keyes*, 6 Paige 478, in which the husband had sold several lots with warranty, the Court held that equity would compel a widow to take her dower out of the unconveyed land, although at law such an assignment could not be made without the widow's assent.

When the husband has conveyed land, and the grantee has improved

part of it, the widow's dower must, if possible, be assigned in the unimproved portion, *Leggett v. Steele*, 4 Wash. C. C. 305.

Dower in wild lands should not be assigned in sparse tracts, so that the whole estate of the widow would be of little value, *Pike v. Underhill's Admr.*, 24 Ark. 124.

Where a widow takes dower against common right, she takes subject to incumbrances, *French v. Pratt*, 27 Me. 381.

By assent, the widow may take the value of her dower in land assigned in fee, *Pritchitt v. Kirkman*, 2 Tenn. Ch. 390.

In assigning dower, the productiveness as well as the value of the lands should be considered, *Smith's Heirs v. Smith*, 5 Dana 179; and also the convenience of the widow and heirs; see *Leonard v. Leonard*, 4 Mass. 533, in which case the Court (PARSONS, C. J., PARKER and SEWALL, JJ.) laid down the following rule of assignment: "To regard the rents and profits only of the several parcels of the estate out of which the dower is to be assigned. When they have ascertained the annual income of the whole estate, they ought to set off to the widow such a part as will yield one-third of such income in parcels best calculated for the convenience of herself and the heirs;" and see *McDaniel v. Heirs of McDaniel*, 3 Ired. Law 61.

If possible, without prejudice to the rights of others, the mansion-house, or usual place of residence of the husband, should be included in the portion of his estate assigned for dower, *Langdon v. Stephens*, 6 Ala. 730; *Stiner v. Cawthorn*, 4 Dev. & Bat. 501; and see Tennessee, Stats. (T. & S.), Pt. 2, Tit. 3, Ch. 3, §§ 2401, 2402, pp. 1076-7; Florida, McClell. Dig., Ch. 95, § 1; Alabama, Code (1876), Pt. 2, Tit. 3, Ch. 2, Art. 2, § 2238; Iowa, Stats., Tit. XVI., Ch. 4, § 2441, p. 655; Arkansas, Rev. St., Ch. XLIX., §§ 2228, 2229.

It is error to assign as dower a privilege in the lands of others, *Jones v. Jones*, 1 Busbee Law, 177.

Value of Land—How Fixed for the Purpose of Assignment of Dower.

In fixing the value of land for the purpose of assigning dower, the rule is that, as against the heir, the value at the time of the assignment is to be taken, and the widow will, therefore, have the advantage of any improvements made by the heir, for the reason given in the old books, that it was his folly to improve before he had assigned the widow her dower, *Catlin v. Ware*, 9 Mass. 218; *Keith v. Trapier*, 1 Bail. Eq. 63; *McGehee v. McGehee*, 42 Miss. 747; *Stewart v. Pearson*, 4 S. C. 4; *Larrowe v. Beam*, 10 Ohio 498; *Price v. Hobbs*, 47 Md. 359; *Husted's Appeal*, 34 Conn. 488.

When the question is as to the value to be taken as against the alienee of the husband, the rule has been stated to be that the value is to be taken as of the time of alienation, *Catlin v. Ware*, 9 Mass. 218; *Russell v. Gee*, 2 Mills 254; *Brown v. Duncan*, 4 McC. 346; *Beavers v. Smith*, 11 Ala. 20; and the widow can have no advantage from improvements made by the tenant, *Ayer v. Spring*, 9 Mass. 8; *Barney v. Frowner*, 9 Ala. 901.

The tendency of the Courts has been to render this rule somewhat more liberal in its operation towards the widow, and it is now very generally held, that while she can have no advantage arising from the improvements of her husband's alienee, she may yet have the advantage arising from the general improvement of the neighborhood in which the lands lie, or from other causes which, independently of the alienee's acts, tend to appreciate their value, *Johnston v. Vandyke*, 6 McL. 422; *Shirtz v. Shirtz*, 5 Watts 255; *Powell v. Monson and Brimfield Manuf. Co.*, 3 Mason 347; *Mosher v. Mosher*, 15 Me. 371; *Allen v. McCoy*, 8 Ohio 418; *Smith v. Addleman*, 5 Blackf. 406; *Wale v. Hill*, 7 Dana 172; *Rawlins v. Buttel*, 1 Houst. 224; *Wooldridge v. Wilkins*, 3 How. (Miss.) 360; *Dunseth v. Bank of the United States*, 6 Ohio 76; *Green v. Tennant*, 2 Harring. 336; *Bowie v. Berry*, 1 Md. Ch. 452; *Summers v. Babb*, 13 Ill. 483; *Fritz v. Tudor*, 1 Bush. 28; *Scammon v. Campbell*, 75 Ill. 223; *Boyd v. Carlton*, 69 Me. 200; *Price v. Hobbs*, 47 Md. 359; *Manning v. Laboree*, 33 Me. 343; *Hobbs v. Harvey*, 16 Id. 80; *Lawson v. Morton*, 6 Dana 471.

From the rule thus liberalized, there are some dissidents. In *Walker v. Schuyler*, 10 Wend. 480, the Supreme Court of New York laid down the rule that the widow should be endowed of the value of the land as at the time of alienation, and *no more*. SAVAGE, C. J., said: "The distinction between the increased value of the land, as arising from its direct improvement by the alienee, or from extrinsic causes, does not seem to have been taken in the English books. . . . Any other rule than that adopted by this Court would be difficult of application. It is not easy to say how much of the appreciated value has arisen from the labor and money expended upon the land. . . . It is certainly reasonable that the enhanced value should enure to the benefit of those through whose labor, suffering, and expenditure the appreciation has been procured. If the property has been rendered more valuable by the general improvement of the country, the defendant, and not the plaintiff, has contributed to that general improvement;" and see *Dorchester v. Coventry*, 11 Johns. 510; *Humphrey v. Phinney*, 2 Id. 484; *Allan v. Smith*, 1 Cow. 180; *Shaw v. White*, 13 Johns. 179; *Dolf v. Basset*, 15 Id. 21; *Parks v. Hardey*, 4 Bradf. 15; *Hale v. James*, 6 Johns. Ch. 258; *Marble v. Lewis*, 53 Barb. 432. It is true that some of the cases cited were decided under the statute of New York, which declares that the

dower assigned shall be "according to the value of the land, exclusive of improvements made since the sale." But KENT, C. J., declared in *Humphrey v. Phinney*, that the statute introduced no new rule, "for such was the law as understood and declared in the most ancient decision of which we have any report, 17 Hen. III., Dower 192, 31 Ed. 1, Voucher 288; Perkins, Tit. Dower, § 328." So that the position of the New York courts may be stated as that of express dissent from the rule which distinguishes between the causes of improvement, and which KENT, although he could not sanction it as a judge, approves as a text writer; see Kent, Com., Vol. 4, p. 67.

The New York doctrine was also held by the Supreme Court of Virginia, in *Tod v. Baylor*, 4 Leigh 498, TUCKER, P., dissenting; and was the law in Minnesota prior to the abolition of dower in that State, *Guerin v. Moore*, 25 Minn. 462; and see *Barney v. Frowner*, 9 Ala. 901. *Van Dorn v. Van Dorn*, Penning. 698, is hardly an exception to the general American rule; for though the Court said, generally, that the dower should be assigned as of the value at the time of alienation, yet it is evident from the report that the only question before the Court was as to the right of the widow to be endowed of the improvements, it being argued that the purchaser, as well as the heir, made his improvements with knowledge of the widow's rights, and that, therefore, the same rule should be applied to both. The same remark will apply in a great measure to *Catlin v. Ware*, 9 Mass. 218.

A purchaser at a sale, upon an execution against the husband, is an alienee within the rule, *Price v. Hobbs*, 47 Md. 359; *Woods v. Morgan*, 56 Ala. 397, and it has even been held that a conveyance to a child, upon a good consideration only, will render the widow's dower liable to the same rule of assignment; see *Stokey v. Stokey*, 89 Ill. 40, in which case DICKEY, J., said: "It may be that to each child was conveyed the precise share of the property which it would have inherited in the absence of the conveyance, or of any change in the condition of the property. Their father chose to give them the property by deed rather than by will or inheritance, and he must be taken to have intended to accomplish the legal effect attending upon the conveyance."

Where, after a demand for dower has been made, the tenant has gone on and made repairs and improvements upon the premises in which dower has been demanded, he has been refused any allowance for such repairs and improvements, *Walsh v. Wilson*, 131 Mass. 535.

In fixing the value of land where it has been sold at sheriff's sale, the sum paid will not be regarded as an absolute measure of the value at the time of the sale, and it may be shown that the land was really worth more,

but it seems it may not be shown that it was worth less, *Alexander v. Hamilton*, 12 So. Car. 39.

Where the husband has conveyed his land by giving a title bond, the date of its delivery is regarded as the date of alienation, *Wilson v. Oatman*, 2 Blackf. 223.

Where the value of land conveyed by the husband in his lifetime has depreciated, the valuation for the purposes of dower should be as at the time of the assignment, *McClanahan v. Porter*, 10 Mo. 746. Thus, where buildings which were upon the land at the time of conveyance were destroyed by accident, and new buildings were erected in their place, it was held that the widow should suffer the loss by the destruction of the old, but should reap no advantage from the erection of the new buildings, *Braxton v. Coleman*, 5 Call 433; *Westcott v. Campbell*, 11 R. I. 378. But there is a distinction between cases in which the destruction is the result of accident, or of the wear of time, and those in which it is the deed of the owner of the land himself. In *Beavers v. Smith*, 11 Ala. 20, where an old building was pulled down by the alienee and a new one built, it was held that the value of the old building should be settled in equity and the widow should have her dower thereof.

This question of valuation has been the subject of statutory regulation in several States. In South Carolina, it is enacted that the valuation of dower against a purchaser shall be according to the value of the land at the time of alienation, with interest from said time added, Code, Pt. 3, Tit. 3, Ch. 112, p. 530. In Ohio, it is provided that permanent improvements made after alienation shall be excluded in estimating the value of dower, Rev. St., Tit. II., Div. 7, Ch. 7, § 5716. In Michigan, Comp. Laws, Vol. 2, Tit. XXII., Ch. CLI., § 4275; Minnesota, Gen. Sts., Ch. 48, § 1; Nebraska, Comp. St., Pt. 1, Ch. 23, § 7; Oregon, Ch. 17, Tit. 1, § 7; Wisconsin, Rev. St., Pt. 2, Tit. 20, Ch. 98, § 2166, dower is to be estimated as at the time of alienation. The statute of Kentucky excludes permanent improvements, even as against the heir, Gen. St., Ch. 52, Art. IV., § 9, p. 530. The Code of Virginia contains a provision substantially the same as the rule stated in *Thompson v. Morrow*, *supra*; see Code, Tit. 31, Ch. 106, §§ 11, 12, p. 555.

Excessive Assignment of Dower—Eviction.

An excessive assignment of dower may be set aside by a court of equity, *In the Matter of Ann Garrison*, 2 McCart. 393; which may exercise its power upon terms, *Pierson v. Hitchner*, 25 N. J. Eq. 129; and where, after the assignment, a recovery is had against the heirs, which does not include the portion set out to the widow, the assignment is thereby avoided, *Single-*

ton's Heirs v. Singleton's Exr., 5 Dana 87; and where the widow is lawfully evicted of her dower, assigned according to common right, she may be re-endowed, *French v. Pratt*, 27 Me. 381.

Collusive Assignment.

A collusive assignment or recovery of dower will not bind a minor heir; see Ohio, Rev. St., Tit. 1, Div. 7, Ch. 7, § 5717; Kentucky, Gen. St., Ch. 52, Art. IV., § 10, p. 531; Michigan, Comp. Laws, Vol. 2, § 4297; Wisconsin, Rev. St., Pt. 2, Tit. 20, Ch. 98, § 2179; Missouri, Rev. St., Vol. 1, Ch. 29, § 2220, p. 369; Nebraska, Comp. Laws, Ch. 23, § 28, p. 216; New Jersey, Rev. of 1877, p. 34, pl. 6; New York, Rev. St. (1882), Pt. 2, C. 1, Tit. 8, § 24; Oregon, Stats., Ch. 17, Tit. 1, § 29, p. 587.

Acquiescence in Illegal or Defective Assignment.

An illegal, informal, or defective assignment may, by long acquiescence, become binding, *Robinson v. Miller*, 1 B. Mon. 88; *Hickman v. Irvine's Heirs*, 3 Dana 121; *Mitchell v. Miller*, 6 Dana 79; *Austin v. Austin*, 50 Me. 74; *Wood v. Lee*, 5 T. B. Mon. 50; *Robinson v. Miller*, 2 B. Mon. 284.

Assignment as Finality.

In several States, it is provided that the widow may receive an assignment as a finality, which will not be disturbed or increased except in case of a lawful eviction, but will bar the widow's claim even as against lands in which dower has not been assigned, Michigan, Comp. Laws, Vol. 2, Ch. 151, § 4296, p. 1363; Wisconsin, Rev. St., Ch. 98, § 2178, p. 628; Nebraska, Comp. Laws, Ch. 23, § 27; New York, Rev. St., Pt. 2, Ch. 1, Tit. 3, § 23; Oregon, Stats., Ch. 17, Tit. 1, § 28, p. 587.

Effect and Scope of Assignment.

After assignment, the wife is possessed as of the seizin of her husband, and is subject to the same estoppels, *Lawrence v. Brown*, 5 N. Y. 398; *Den ex d. Williams v. Bennett*, 4 Ired. Law 123; her interest is not the subject of a partition suit by the heirs, for she is not a tenant in common, *Clark v. Richardson*, 32 Iowa 399; nor can she apply for partition, *Liederkrantz Society v. Beck*, 8 Bush. 597.

The assignment will carry with it the crops growing on the dower land at the time of assignment, unless otherwise reserved, *Ralston v. Ralston*, 3 Iowa 533.

After assignment, the assignor is estopped from denying that the land in which dower was assigned was subject to dower, *Shattuck v. Gragg*, 23 Pick. 88.

Quarantine.

Quarantine is the right given to the widow by statute, 9 Hen. III., c. 7, to remain in her husband's capital mansion-house for forty days after his death; during which time her dower shall be assigned, 2 Blackst. Com. 135.

This right is generally recognized throughout the United States; in some of them the time during which it may be exercised has been increased by statutes, and in some its scope has been increased so as to include more than the mere house; but it is believed that, in the main, its incidents, as at common law, have been left untouched.

By statutes in Alabama, Code (1876), Pt. 2, Tit. 3, Ch. 2, Art. 2, § 2238; Georgia, Code (1873), Pt. 2, Tit. 2, Ch. 1, Art. 2, § 1768; and see *Claiborne's Exr. v. Calhoun*, 58 Ga. 274; Missouri, Rev. St., Vol. 1, Ch. 29, § 2205, p. 366; New Jersey, Rev. of 1877, p. 320, pl. 2; Florida, McClell. Dig., Ch. 95, § 3; Rhode Island, Rev. Sts., Tit. 29, Ch. 229, § 6; Vermont, Rev. St. (1880), Tit. 15, Ch. 114, § 2224, p. 451; West Virginia, Rev. St., Ch. 70, § 8, p. 500; Virginia, Code, Tit. 31, Ch. 106, § 8; Illinois, see *Strawn v. Strawn's Heirs*, 50 Ill. 276, the duration of the right is extended until dower is assigned.

In Michigan, Comp. Laws, Vol. 2, Tit. 22, Ch. 151, § 4291; Oregon, Stats., Ch. 17, Tit. 1, § 23; Nebraska, Comp. Laws, Pt. 1, Ch. 23, § 22; Ohio, Rev. St. (1880), Pt. 2, Tit. 4, Ch. 3, § 4188, p. 1049; Kentucky, Gen. St., Ch. 52, § 8, p. 530, the duration is fixed at one year.

In Maine, Rev. St., Tit. IX., Ch. 103, § 14, at ninety days.

In Arkansas, at two months; and if dower be not assigned within that time, the widow may retain possession of the decedent's farm until dower is assigned, Rev. St., Ch. XLIX., §§ 2226, 2227; and see *Carnall v. Wilson*, 21 Ark. 62.

The statutes of New York, Rev. St., Pt. 2, Ch. 1, Tit. 3, § 17, p. 2199; New Hampshire, Gen. Laws, Tit. 24, Ch. 202, § 12, p. 475; and Massachusetts, Pub. Sts. (1882), Ch. 124, § 3, p. 741, recognize the old term of forty days.

In Alabama, the widow is likewise entitled to possession of the offices and buildings appurtenant to the manor.

In Indiana, the right extends to the messuage and portion of the farm or land necessarily attached to the house, *Grimes v. Wilson*, 4 Blackf. 331.

In Kentucky it extends to the whole plantation, *Chaplin v. Simmon's*

Heirs, 7 T. B. Mon. 337; *White v. Clarke*, Id. 640; *Renfroe's Heirs v. Taylor*, 12 B. Mon. 402.

Land at a distance is not considered a part of the messuage or plantation, *Sharpley v. Jones*, 5 Harring. 373; or lands which, having been wild, have been cleared and added to the plantation since the husband's death, *White v. Clarke*, 7 T. B. M. 640.

The right of quarantine exists only as to land of which the widow is dowable, *Voelckner v. Hudson*, 1 Sand. Sup. Ct. 215; *Harrison v. Boyd*, 36 Ala. 203; and hence does not extend to leaseholds, *Pizzala v. Campbell*, 46 Ala. 35; *Vaelckner v. Hudson*, *supra*. It is confined to what was the actual residence of the husband, *Clay v. Sanders*, 43 Ala. 287; *Ogbourne v. Ogbourne's Admr.*, 60 Id. 616; and hence, in a case where the husband owned but one house, and did not live therein, the widow could have no quarantine, *Clay v. Sanders*, *supra*. It does not cover crops which would otherwise be assets in the hands of the executors, *Singleton's Heirs v. Singleton's Exr.*, 5 Dana 87. It is not given to a widow who lived apart from her husband at the time of his death, *Rich v. Rich*, 7 Bush. 53.

Quarantine is not subject to execution, *Doe ex d. Cook v. Webb*, 18 Ala. 814; *Carnall v. Wilson*, 21 Ark. 62; it being not an estate, but a mere personal right, *Roach v. Davidson*, 3 Brev. 80; *Bleecker v. Hennion*, 23 N. J. Eq. 123. The widow, during her quarantine, is not liable for taxes, *Graves v. Cochran*, 68 Mo. 74.

Incidents of Quarantine.

During her possession, by virtue of quarantine, the widow's right is absolute, and the heirs can claim from her no rent, *McLaughlin v. Godwin*, 23 Ala. 846; or account, *McLaughlin v. McLaughlin*, 22 N. J. Eq. 505, reversing S. C. 20 Id. 190. She is not bound to occupy the premises in person, but may do so by a tenant, if she does not surrender her right of possession, *Doe ex d. Caillaret v. Bernard*, 7 Sm. & M. 319; *White v. Clarke*, 7 T. B. M. 641; *Oraige v. Morris*, 25 N. J. Eq. 467; and if the possession is withheld, she can recover rent from the administrator, *Boynton v. Sawyer*, 35 Ala. 497; or she can obtain possession by ejectment, *Miller v. Talley*, 48 Mo. 503; her right is so absolute, that where the widow is also administratrix, and rents out the mansion, she will not be accountable therefor to the heir, *McLaughlin v. Godwin*, *supra*; but where she is administratrix in a State according to whose laws the administrator controls the whole estate, she cannot, by virtue of her double position, claim to hold by quarantine indefinitely; and if she do not institute proceedings to assign dower within a reasonable time, she will be chargeable, as administratrix, with two-thirds

of the rents and profits of the land from the time at which dower should have been assigned, *Benagh v. Turrentine*, 60 Ala. 557.

The right is not lost by the subsequent marriage of the widow, *Shelton v. Carrol*, 16 Ala. 146; *Wallace v. Hall's Heirs*, 19 Ala. 367; or by an election to take in lieu of dower the statutory child's share of the husband's estate, *Orrick v. Robbins*, 34 Mo. 226; or by taking a statutory allowance for support during administration, *Farnsworth v. Cole*, 42 Wisc. 403.

The right rests on possession, and, if the widow surrenders, she cannot retake possession; she must look to her remedies for withholding dower alone, and cannot take and hold the mansion by way of security, *Den ex d. Smallwood v. Bilderback*, 1 Harr. (N. J.) 497. The law is otherwise in Georgia, where the common-law rule does not prevail, *Rambo v. Bell*, 3 Ga. 207.

Where, however, she has not surrendered possession, but it is withheld from her, she may enforce it by an ejectment, *Miller v. Talley*, 48 Mo. 503; *Brown v. Moore*, Supreme Court of Missouri, 1882, 13 Reporter 758.

On the expiration of the time limited for quarantine, the widow must leave the premises, although her dower be not yet assigned; she cannot hold them in order to compel an assignment, but is put to her action, *Clark v. O'Donaghy*, 7 Johns. 247.

Detention of Dower—Remedies for.

At common law, the widow could originally recover no damages where her dower was detained from her, *Kendall v. Honey*, 5 T. B. Mon. 282; *Johnson v. Thomas*, 2 Paige 377; as her right ran only from the time of assignment. The statute of Merton, 20 Hen. III., C. 1, however, gave the widow the right to recover damages where the husband died seized. See *Embree v. Ellis*, 2 Johns. 119; but the statute gave no damages as against an alienee of the husband, *Kendall v. Honey*, *supra*; *Marshall v. Anderson*, 1 B. Mon. 198; and it has been held that, under the statute, the widow cannot recover as damages back rents, even from the time of suit begun, *Hill v. Golden*, 16 B. Mon. 553; *Garton's Heirs v. Bates*, 4 Id. 367.

But equity would give an account of rents and profits even when no damages were recoverable under the statute, *Keith v. Trapier*, 1 Bailey Eq. 63, the opinion in which case confines the effect of the decision in *Heyward v. Cuthbert*, 1 McCord 386, that damages could not be recovered against an alienee for the detention of dower, to the recovery of damages *eo nomine* at law. In *Price v. Hobbs*, 47 Md. 359, it was held that equity would give damages accruing after dower had been demanded; and in *Clark v. Tompkins*, 1 So. Car. 119, it was held that the widow, after assignment of

dower, was entitled to an account from the time her right attached; but see *Johnson v. Thomas*, 2 Paige 377.

The right of the widow to recover damages for detention of dower has been recognized by statute in many of the States, and it is thought that even where no statute giving her the right to recover exists, equity would give her an account. See Rhode Island, Sts., Tit. 29, Ch. 229, § 7, p. 637; Virginia, Code, Tit. 31, Ch. 106, § 10, p. 855; West Virginia, Rev. St., Ch. 70, §§ 10, 11; New Jersey, Rev. St. (1877), p. 321, pl. 3; Maine, Rev. St. (1871), Tit. IX., Ch. 103, § 20, p. 759; Delaware, Rev. Code (1874), Ch. 87, § 13; and see *Green v. Tennant*, 2 Harring. 336; Michigan, Comp. Laws, Vol. 2, Tit. 22, Ch. 181, §§ 4292, 4294, p. 1363; Wisconsin, Rev. St., Pt. 2, Tit. 20, Ch. 98, §§ 2175, 2177; Missouri, Rev. St., Vol. 1, Ch. 29, § 2206, p. 367; New Hampshire, Sts., Ch. 246, § 4, p. 566; Nebraska, Comp. Laws, Pt. 1, Ch. 23, §§ 23, 25; Oregon, Stats., Ch. 17, Tit. 1, §§ 24, 26; New York, Rev. Stat., Pl. 2, Ch. 1, Tit. 3, §§ 19, 21, p. 2199; Massachusetts, Pub. St., (1882) Ch. 114, § 4.

Necessity for Demand to Enable Widow to Recover for Detention of Dower.

Until after demand, however, there can, as a rule, be no recovery by the widow of rents, profits, or damages, either at law or in equity, *Peyton v. Jeffries*, 50 Ill. 143; *Strawn v. Strawn's Heirs*, Id. 256; *Spencer v. Weston*, 1 Dev. & Bat. Law 213; *Whitaker v. Greer*, 129 Mass. 417; but a commencement of a suit or action is held a sufficient demand, *Peyton v. Jeffries*, *supra*. In Rhode Island, it is provided that the demand must be at least one month before bringing the action; see *statute, supra*; and in Maine the notice must be at least one month, and not more than one year prior to the action, Rev. St., Tit. IX., Ch. 103, § 17.

The measure of damages for detention of dower is naturally the widow's third of the reasonable net yearly value of the premises, whether they have been used or not, *O'Flaherty v. Sutton*, 49 Mo. 583; and see *Bolster v. Cushman*, 34 Me. 428; *Wyman v. Richardson*, 62 Id. 293.

Incidents of Dower—Taxes.

The widow is chargeable with the taxes upon her dower estate during its continuance, *Durkee v. Felton*, 44 Wisc. 467; *Whyte v. Mayor and Aldermen of Nashville*, 2 Swan. 364; *Linden v. Graham*, 34 Barb. 316.

Impeachability for Waste.

She is not permitted to commit waste, and it is provided in some States that waste by the widow will cause a forfeiture of her estate, besides subjecting her to an action for damages, Maine, Rev. St., 1871, Tit. IX., C. 103, § 6, p. 757; Massachusetts, Ch. 124, § 16, p. 742; Ohio, Rev. St., Pt. 2, Tit. IV., Ch. 3, § 4194; Rhode Island, Stats., Tit. 29, Ch. 229, § 22, p. 639; but in most States the penalty is limited to a subjection to damages, New Hampshire, Gen. Stat. (1878), C. 202, § 6, p. 474; Michigan, Comp. Laws, Vol. 2, § 4290; Wisconsin, Rev. St., § 2174; Nebraska, Comp. Laws, Ch. 23, § 21; Oregon, Stats., Ch. 17, § 22, p. 587; Delaware, Rev. Code, Ch. LXXXVIII., § 1; Maryland, Rev. St., Tit. 24, Art. 50, § 221, p. 474.

It is not waste, however, for the dowress to clear an amount of land reasonably necessary for the cultivation of the rest of her dower estate, *Joyner v. Speed*, 68 N. C. 236; and see *Macaulay's Ex'r. v. Dismal Swamp Land Co.*, 2 Rob. (Va.) 507; *Lanbeth v. Warner*, 2 Jones Eq. 165; and she may clear wood-land to a reasonable extent, *Hastings v. Crunkleton*, 3 Yeates 261; and the widow is not bound to use each parcel of her land as if her husband had died seized of it alone, and, therefore, where she has been assigned dower in wood-land and in cultivated land, she may take fuel from the former for use upon the latter, without being guilty of waste, *Childs v. Smith*, 1 Md. Ch. 483; but she may not, where she is endowed of two distinct pieces of land, take firewood from one for use in both, *Cook v. Cook*, 11 Gray 123.

An injunction to stay waste will not be issued against a widow, as the legal remedies are sufficient, *Palmer v. Casperson*, 17 N. J. Eq. 204.

Valuation of Dower Interest.

In the valuation of a dower interest, the same rules will apply as in the case of the valuation of a life interest in general (q. v., page 214 et seq.). The life tables have been recognized by the courts in connection with dower, in *McHenry v. Yokum*, 27 Ill. 160; *Alexander's Ex'x v. Bradley*, 3 Bush. 667; and the Maryland rule (see p. 215) in *Dorsey v. Smith*, 7 H. & J. 345; *Abercrombie v. Riddle*, 3 Md. Ch. 320.

In Dealing with Dower, Legal Principles Prevail.

As dower is a strictly legal right, courts of equity, although they have concurrent jurisdiction of the subject with the courts of law, will be governed in dealing with it by the same principles which control the latter

courts, *Stilson v. Stilson*, 46 Conn. 18; *Ocean Beach Association v. Brinley*, 34 N. J. Eq. 438.

Dower Governed by Lex Loci Rei Sitae.

As dower is a right connected with or arising out of land, it will, where the land in which the estate in dower is claimed is in one jurisdiction, and the owner of the land is in another, be governed by the *lex loci rei sitae*, *Lamar v. Scott*, 3 Strobb. 562; *Duncan v. Dick*, Walk. (S. C. Miss.) 281; *Jones v. Gerock*, 6 Jones Eq. 190; *Apperson's Ex'r v. Bolton*, 29 Ark. 418; *Mitchell v. Word*, 60 Ga. 525. Thus in *Lamar v. Scott*, *supra*, the husband was a resident of Georgia, in which State the law gave dower in the lands of which the husband died seized only, the land was in South Carolina, where dower was given as at common law, it was held that the widow should be endowed according to the law of South Carolina.

A decree for dower made by a court in a State other than that of the forum, will be held to be confined to lands in the State in which the decree was made, *Jones v. Gerock*, *supra*.

Where Law has been Changed during Coverture, by what Law Widow's Rights are to be Determined.

We have seen that dower, while inchoate, is completely within the control of the Legislature, and can be by it modified, or even abolished, and the question then arises, in a case in which such action has been taken by the Legislature, by the law, as of what time shall the widow's rights be determined? It may be stated, as a general rule, that where the question arises between the widow and those whose interests have accrued simultaneously with the consummation of hers, the law at the time of the husband's death will govern, and not that at the time of marriage, *Ware v. Owens*, 42 Ala. 212; *Boyd v. Harrison*, 36 Id. 533; *Lucas v. Sawyer*, 17 Iowa 517; *Barbour v. Barbour*, 46 Me. 9; *Walker's Adm'r v. Deaver*, 5 Mo. App. 139; *Kennerly v. Missouri Ins. Co.*, 11 Mo. 204; *Riddick v. Walsh*, 15 Id. 519 (the syllabus in this last case is incorrect, and does not correctly state the decision of the Court, for which see pages 537-8).

Where the question arises between the widow and an alienee of the husband, the law at the time of the conveyance by the husband will prevail, *O'Ferrall v. Simplot*, 4 Iowa 381; *Young v. Wolcott*, 1 Id. 174; *Davis v. O'Ferrall*, 4 G. Greene 358; *Comly v. Strader*, 1 Ind. 134; *Kennerly v. Missouri Insurance Co.*, *supra*; and there would seem to be no doubt as to this where the effect of the subsequent legislation has been to give dower

where it before did not exist, or to increase its extent. Thus, in the case last cited, it was held that where, as the law stood at the time of a sheriff's sale, such a sale would bar the dower of the debtor's wife, and after the sale an act of Legislature was passed which saved to the widow her dower in such a case, the widow of one whose lands had been sold by the sheriff prior to this act could not claim dower therein. In cases where the subsequent legislation has reduced or abolished the wife's right of dower, there is more question; for while, on the one hand, a purchaser of the husband has presumably taken subject to the right of dower, with full knowledge thereof, and has probably, in fixing the price of the land, allowed therefor, yet, on the other hand, the absolute power of the Legislature over the inchoate dower must be remembered.

A curious result has been reached, in at least one State, from the combination of the principle of the absolute power of the Legislature over dower inchoate, with the desire of the courts to protect the vested rights of a purchaser.

In Indiana, prior to the year 1853, the widow was entitled to dower as at common law. In that year an act was passed abolishing dower *eo nomine*, and giving to the widow, in lieu thereof, a fee in one-third of the lands of which the husband was seized during coverture. The effect of this legislation upon lands conveyed prior to the act, came before the Supreme Court in *Strong v. Clem*, 12 Ind. 37; in that case a husband had, prior to the act, conveyed land, subject to dower, and died after the act had been passed. The widow claimed dower from the purchaser, but the Court held that she could have neither the common law dower nor the one-third in fee, for the right to the first had been abolished, and the second could not be given to her without a violation of the vested rights of the purchaser. The same decision was made in *Logan v. Walton*, 12 Ind. 639; *Strong v. Dennis*, 13 Ind. 514; *Giles v. Gullion*, Id. 487; *Frantz v. Harrow*, Id. 507; and the principle was carried further in the case of *Hoskins v. Hutchings*, 37 Ind. 324, where it was held that the security of a mortgage creditor could not be diminished by the enlargement of the widow's rights.

The same general question arose in Iowa in 1873, under legislation similar in all respects, except that, while giving a one-third fee, it did not *expressly* abolish dower, but repealed a statute establishing dower as at common law. The conclusion reached by the Supreme Court of Iowa was favorable to the right of the widow to the dower given by the law at the time of conveyance. In delivering the opinion of the Court, MILLER, J., said: "It has been held by this Court, that the right of the widow to dower depends upon the law in force at the time of the death of the husband. . . . There is another class of cases in this Court in which it has been held that the

dower right of the widow should be governed by the law in force at the time of the alienation by the husband. On examination this seeming inconsistency disappears. The cases last alluded to arose where the estate in dower, under the law in force at the time of alienation, had been enlarged by the law in force at the time of the decease of the husband, and were decided mainly on the ground that the estate of dower having been enlarged, the statute should not have a retroactive operation, so as to lessen the estate purchased by the vendee. And since there was no question made in those cases but that the widow was entitled to dower, either under the law in force at the time of alienation or under that in force at the death of the husband, the only controversy being whether she took under the former or under the latter; and as the wife could not take under the statute in force at the death of the husband without an infringement of the vested rights of the purchaser, she was allowed to take her dower under the former law. . . . In this case, however, it is insisted that the wife, not being entitled to dower under the law of 1862, giving an estate of one-third in fee-simple in premises previously conveyed by the husband while the statute gave her dower as at common law, and, since the Act of 1862 repealed the former law in respect to dower, she cannot claim dower under that act, and hence, that she is not entitled to dower at all in the farm in controversy.

“The right of the wife to be endowed of the lands of her husband, so long as it is inchoate only, may be enlarged, abridged, or entirely taken away by statute. . . . And if the Act of 1862, which repealed the Act of 1853, under which the estate of dower was as at common law, had stopped with *simply* a repeal of that act, we would have no hesitation in holding the plaintiff not entitled to dower. But the Act of 1862, while it repealed that of 1853, enlarged the estate of dower from a life estate in one-third of the lands of the husband to an estate in fee-simple in such portion. The evident purpose of the Legislature was not to take away the widow's dower, but to enlarge it. It was a substitution of a fee-simple estate for an estate for life. It was not intended to destroy the smaller estate, but to give a greater one, and since the estate in fee-simple includes in it the lower and inferior estate for life, the latter would be saved to the plaintiff as it existed under the law of 1853, in force when her husband conveyed the farm.”

The learned judge considered the Indiana authorities, and, while recognizing the distinction between the legislation of the States of Iowa and Indiana, dissented from the principle of *Strong v. Clem*; and see *Craven v. Winter*, 38 Iowa 471.

After the above decisions in Iowa, the question was again raised in Indiana, and an endeavor was made to induce the Court to reverse its former decision; it, however, adhered to it, and reaffirmed the law as laid down in

Strong v. Clem; *Taylor v. Sample*, 51 Ind. 423; and see *Colman v. De Wolf*, 53 Ind. 428; *Carr v. Brady*, 64 Id. 28.

An exception to the rule that the law, as at the time of the husband's death, is to control the right of dower, is found in North Carolina; in that State, from the year 1784 to the passage of the Act of 1868-9, the wife's dower was subject to be defeated by the husband's conveyance; by the Act of 1868-9 it was restored as at common law; it is held that property owned by the husband prior to the passage of the act may still be conveyed by him free of dower, *Sutton v. Askeu*, 66 N. C. 172; *Jenkins v. Jenkins*, 82 Id. 208; *Bruce v. Strickland*, 81 Id. 267.

Aliens. Rights of Aliens with Reference to Real Property.

INGLIS, DEMANDANT v. THE TRUSTEES OF THE SAILOR'S SNUG HARBOR IN THE CITY OF NEW YORK.

Supreme Court of the United States, January Term, 1830.

[Reported in 3 Peters 99.]

The testator gave all the rest and residue and remainder of his estate, real and personal, comprehending a large real estate in the city of New York, to the chancellor of the State of New York, and recorder of the city of New York, etc. (naming several other persons by their official description), to have and to hold the same unto them and their respective successors in office to the uses and trusts, subject to the conditions and appointments declared in the will ; which were ; out of the rents, issues and profits thereof, to erect and build upon the land upon which he resided, which was given by the will, an asylum, or marine hospital, to be called " the Sailor's Snug Harbor," for the purpose of maintaining and supporting aged, decrepid, and worn-out sailors, etc. And after giving directions as to the management of the fund by his trustees, and declaring that the institution created by his will should be perpetual, and that those officers and their successors should for ever continue the governors thereof, etc., he adds, " it is my will and desire that if it cannot legally be done according to my above intention, by them, without an act of the Legislature, it is my will and desire that they will as soon as possible apply for an act of the Legislature to incorporate them for the purpose above specified ; and I do further declare it to be my will and intention, that the said rest, residue, etc., of my estate should be at all events applied for the uses and purposes above set forth ; and that it is my desire all courts of law and equity will so construe this my said last will as to have the said estate appropriated to the above uses, and that the same should in no case, for want of legal form or otherwise, be so construed as that my relations, or any other persons, should heir, possess or enjoy my property, except in the manner and for the uses herein above specified."

Within five years after the death of the testator, the Legislature of the State of New York, on the application of the trustees, also named as executors of the will, passed a law constituting the persons holding the offices designated in the will, and their successors, a body corporate, by the name of " the Trustees of the Sailor's Snug Harbor," and enabling them to execute the trusts declared in the will.

This is a valid devise to divest the heir of his legal estate, or at all events to affect the lands in his hands with the trust declared in the will.

If, after such a plain and unequivocal declaration of the testator with respect to the disposition of his property, so cautiously guarding against and providing for every supposed difficulty that might arise, any technical objection shall now be interposed to defeat his purpose ; it will form an exception to what we find so universally laid down in all our books as a cardinal rule in the construction of wills, that the intention of the testator is to be sought after and carried into effect. If this intention cannot be carried into effect precisely in the mode at first contemplated by him, consistently with the rules of law, he has provided an alternative, which with the aid of the act of the Legislature must remove every difficulty.

In the case of "*The Baptist Association v. Hart's Executors*," 4 Wheat. 27, the Court considered the bequest void for uncertainty as to the devisees, and the property vested in the next of kin, or was disposed of by some other provisions of the will. If the testator in that case had bequeathed the property to the Baptist Association, on its becoming thereafter and within a reasonable time incorporated, could there be a doubt but that the subsequent incorporation would have conferred on the association the capacity of taking and managing the fund ?

Whenever a person by will gives property, and points out the object, the property, and the way in which it shall go, a trust is created, unless he shows clearly, that his desire expressed, is to be controlled by the trustee, and that he shall have an option to defeat it.

What are the rights of the individuals composing a society, and living under the protection of the government, when a revolution occurs, a dismemberment takes place, and when new governments are formed, and new relations between the government and the people are established. A person born in New York before the 4th of July, 1776, and who remained an infant with his father in the city of New York, during the period it was occupied by the British troops ; his father being a royalist and having adhered to the British government, and left New York with the British troops, taking his son with him, who never returned to the United States, but afterwards became a bishop of the Episcopal Church in Nova Scotia ; such a person was born a British subject, and continued an alien, and is disabled from taking land by inheritance in the State of New York.

If such a person had been born after the 4th of July, 1776, and before the 15th of September, 1776, when the British troops took possession of the city of New York and the adjacent places, his infancy incapacitated him from making an election for himself, and his election and character followed that of his father ; subject to the right of disaffirmance in a reasonable time after the termination of his minority ; which never having been done, he remained a British subject, and disabled from inheriting land in the State of New York.

The rule as to the point of time at which the American *ante nati* ceased to be British subjects differs in this country and in England, as established by the courts of justice in the respective countries. The English rule is to take the date of the treaty of peace in 1783. Our rule is to take the date of the Declaration of Independence.

The settled doctrine in this country is, that a person born here, but who left the country before the Declaration of Independence, and never returned here, became an alien and incapable of taking lands subsequently by descent. The right to inherit depends upon the existing-state of allegiance at the time of the descent cast.

The doctrine of perpetual allegiance is not applied by the British courts to the American *ante nati*; and this Court, in the case of *Blight's Lessee v. Rochester*, 7 Wheat. 544, adopted the same rule with respect to the rights of British subjects here. That although born before the revolution, they are equally incapable with those born subsequent to that event of inheriting or transmitting the inheritance of lands in this country.

The British doctrine therefore is, that the American *ante nati*, by remaining in America after the peace, lost their character of British subjects; and our doctrine is, that by withdrawing from this country, and adhering to the British government, they lost, or perhaps more properly speaking, never acquired the character of American citizens.

The right of election must necessarily exist in all revolutions like ours, and is well established by adjudged cases.

This Court in the case of *M^r Ilvaine's Lessee v. Coxe*, 4 Cranch 211, fully recognized the right of election; but they considered that Mr. Coxe had lost that right by remaining in the State of New Jersey, not only after she had declared herself a sovereign State, but after she had passed laws by which she declared him to be a member of, and in allegiance to, the new government.

Allegiance may be dissolved by the mutual consent of the government and its citizens or subjects. The government may release the governed from their allegiance. This is even the British doctrine.

C. B. by her last will and testament devised "all her estate, real and personal, wheresoever and whatsoever in law or equity, in possession, reversion, remainder or expectancy, unto her executors and to the survivor of them, his heirs and assigns forever," upon certain designated trusts: under the statute of wills of the State of New York (1 N. Y. Revised Laws 364), all the rights of the testator to real estate, held adversely at the time of the decease of the testator, passed to the devisees by this will.

It is the uniform rule of this Court with respect to the title to real property, to apply the same rule which is applied in State tribunals in like cases.

The right of an absent and absconding debtor to real estate held adversely, passed to and became vested in the trustees by the act of the Legisla-

ture of New York, passed April 4, 1786, entitled "an Act for relief against absconding and absent debtors."

In a writ of right the tenant may, on the mise joined, set up a title out of himself and in a third person. If anything which fell from this Court in the case of *Greene v. Liler*, 8 Cranch 229, can be supposed to give countenance to the opposite doctrine, it is done away by the explanation given by the Court in *Greene v. Watkins*, 7 Wheaton 31. It is there laid down that the tenant may give in evidence the title in a third person for the purpose of disproving the demandant's seizin: that a writ of right does bring into controversy the mere right of the parties to the suit; and if so, it by consequence authorizes either party to establish by evidence that the other has no right whatever in the demanded premises; or that his mere right is inferior to that set up against him.

In a writ of right on the mise joined on the mere right, under a count for the entire right, a demandant may recover a less quantity than the entirety.

THIS case came before the Court at January term, 1829, from the Circuit Court of the United States for the southern district of New York: on points of disagreement certified by the judges of that Court. After argument by counsel, it was held under advisement until the present term.

It was a writ of right, brought in the Circuit Court, for the recovery of certain real estate situate in the city of New York, whereof Robert Richard Randall died seized and possessed.

The count was upon the seizin of Robert Richard Randall, and went for the whole premises.

Paul R. Randall and Catherine Brewerton, a brother and sister of Robert Richard Randall, both survived him, but had since died, without issue.

The demandant claimed his relationship to Robert Richard Randall, through Margaret Inglis, his mother, who was a descendant of John Crooke, the common ancestor of Robert Richard Randall, Catherine Brewerton, and Paul R. Randall.

The tenants put themselves upon the grand assize, and the mise was joined upon the mere right.

The cause was tried at October term, 1827.

The counsel for the tenants began with the evidence, and showed that they had been in possession for a number of years, claiming and holding the land as owners.

The seizin of Robert Richard Randall was then proved, and that he

purchased from one baron Poelnitz. The genealogy of the demandant as next collateral heir of Robert R. Randall on the part of his mother, and that the blood of Thomas Randall, the father of Robert Richard Randall, was extinct, was proved.

It was in evidence that the British troops entered into New York on the 15th of September, 1776, and took and had full possession thereof, and of the adjacent bays and islands, and established a civil government there under the authority of the British commander-in-chief.

Evidence was given to prove that the demandant was not more than one year old when the British troops entered the city of New York, where he was born; that the father of the demandant was a native of Ireland, and had resided for some time in New York, and continued to reside there until he left there for England, on the day of or the day before the evacuation of New York, the 25th of November, 1783. He took the demandant with him to England, remained there two years, was appointed a bishop, and went to Nova Scotia in 1785 or 1786, and there resided until his death. The mother of the demandant died in New York on the 21st of September, 1783, a little while before the evacuation thereof by the British troops. It was always considered by a witness who testified in the cause, that Charles Inglis, the father of the demandant, was a royalist. The demandant was certainly born before the year 1779; in 1783 he could not speak plainly, and was considered not more than five years old, between four and five. He took his degree of master of arts in England, was there ordained a clergyman; his place of residence from the time he first arrived at Nova Scotia was with his father, and he has continued to reside there ever since. He went to England to be consecrated a bishop; which character he now holds, being bishop of Nova Scotia. Charles Inglis, the father of the demandant, had four children, the eldest of which, a son, died an infant, 20th of January, 1782, two daughters, and the demandant, who was the youngest child.

The following proceedings of a convention of the State of New York, before the British entered the city, were in evidence:

TUESDAY AFTERNOON, July 16, 1776.

Present, General Woodhull, president, and the members of the convention.

Whereas, the present dangerous situation of this State demands the

unremitted attention of every member of the convention: Resolved unanimously, that the consideration of the necessity and propriety of establishing an independent civil government be postponed until the first day of August next, and that in the meantime,

“Resolved unanimously, that all magistrates and other officers of justice in this State, who are well affected to the liberties of America, be requested, until further orders, to exercise their respective offices, provided, that all processes, and other their proceedings, be under the authority and in the name of the State of New York.

“Resolved unanimously, that all persons abiding within the State of New York, and deriving protection from the laws of the same, owe allegiance to the said laws, and are members of the State: and that all persons passing through, visiting, or making a temporary stay in said State, being entitled to the protection of the laws during the time of such passage, visitation, or temporary stay, owe, during the same, allegiance thereto.

“That all persons, members of or owing allegiance to this State, as before described, who shall levy war against the said State, within the same, or be adherent to the king of Great Britain, or others, the enemies of the said State, within the same, giving to him or them aid or comfort, are guilty of treason against the State, and being thereof convicted, shall suffer the pains and penalties of death.”

The tenants gave in evidence the acts of the Legislature of New York: “For the forfeiture of the estates of persons who adhered to the enemies of the State,” etc., passed the 22d of October, 1779; the “act supplementary to the act to provide for the temporary government of the southern part of this State,” etc., passed the 23d of October, 1779; and the supplement thereto, passed the 27th of March, 1783.

Robert Richard Randall died in the city of New York between the 1st of June and the 1st of July, 1801, having on the 1st of June of that year made his last will and testament; probate of which was regularly made in the city of New York.

The provisions of the will of Robert Richard Randall under which the tenants claimed their title are the following:

“6. As to and concerning all the rest, residue and remainder of my estate, both real and personal; I give, devise and bequeath the same unto the chancellor of the State of New York, the mayor and recorder of the city of New York, the president of the chamber of commerce in

the city of New York, the president and vice-president of the marine society of the city of New York, the senior minister of the Episcopal Church in the said city, and the senior minister of the Presbyterian Church in the said city, to have and to hold all and singular the said rest, residue, and remainder of my said real and personal estate, unto them the said chancellor of the State of New York, mayor of the city of New York, the recorder of the city of New York, the president of the chamber of commerce, president and vice-president of the marine society, senior minister of the Episcopal Church, and senior minister of the Presbyterian Church in the said city, for the time being, and their respective successors in the said offices forever, to, for, and upon the uses, trusts, intents and purposes, and subject to the directions and appointments hereinafter mentioned and declared concerning the same, that is to say, out of the rents, issues and profits of the said rest, residue, and remainder of my said real and personal estate, to erect and build upon some eligible part of the land upon which I now reside, an asylum, or marine hospital, to be called 'the Sailor's Snug Harbor,' for the purpose of maintaining and supporting aged, decrepid, and worn-out sailors, as soon as they, my said charity trustees, or a majority of them, shall judge the proceeds of the said estate will support fifty of the said sailors, and upwards; and I do hereby direct, that the income of the said real and personal estate, given as aforesaid to my said charity trustees, shall forever hereafter be used and applied for supporting the asylum, or marine hospital, hereby directed to be built, and for maintaining sailors of the above description therein, in such manner as the said trustees, or a majority of them, may from time to time, or their successors in office may from time to time direct. And it is my intention that the institution hereby directed and created should be perpetual, and that the above-mentioned officers for the time being, and their successors, should forever continue and be the governors thereof, and have the superintendence of the same. And it is my will and desire, that if it cannot legally be done, according to my above intention, by them, without an act of the Legislature, it is my will and desire that they will as soon as possible apply for an act of the Legislature to incorporate them for the purposes above specified. And I do further declare it to be my will and intention, that the said rest, residue and remainder of my real and personal estate, should be at all events applied for the uses and purposes above set forth; and that it is my desire all courts of law and equity will so

construe this my said will, as to have the said estate appropriated to the above uses, and that the same should in no case, for want of legal form or otherwise, be so construed as that my relations, or any other persons, should heir, possess, or enjoy my property, except in the manner and for the uses herein above specified.

"And, lastly, I do nominate and appoint the chancellor of the State of New York, for the time being, at the time of my decease; the mayor of the city of New York, for the time being; the recorder of the city of New York, for the time being; the president of the chamber of commerce, for the time being; the president and vice-president of the marine society in the city of New York, for the time being; the senior minister of the Episcopal Church in the city of New York, and the senior minister of the Presbyterian Church in the said city, for the time being; and their successors in office after them, to be the executors of this my last will and testament, hereby revoking all former and other wills, and declaring this to be my last will and testament."

It was admitted, that at the time of the decease of Robert Richard Randall, and of the probate of the will, the offices named in the will were respectively filled by different persons, and that they, or some of them, immediately upon the death of the testator, entered upon the premises under the will, claiming to be the owners in fee, until the Legislature of New York, on their application, on the 6th of February, 1806, passed "an act to incorporate the trustees of the marine hospital, called the Sailor's Snug Harbor, in the city of New York."

Those offices continued to be filled respectively by different persons, from the time of the death of the testator until the time of the trial.

The act incorporating "the trustees of the marine hospital," etc., provides,

Whereas, it is represented to the Legislature, that Robert Richard Randall, late of the city of New York, deceased, in and by his last will and testament, duly made and executed, bearing date the 1st day of June, in the year of our Lord, 1801, did, after bequeathing certain specific legacies therein mentioned, among other things give and devise and bequeath all the residue of his estate, both real and personal, unto the chancellor of this State, the mayor and recorder of the city of New York, the president of the chamber of commerce in the city of New York, the president and vice-president of the marine society of the city of New York, the senior minister of the Episcopal Church in the said city, and

the senior minister of the Presbyterian Church in the said city, for the time being, and to their successors in office respectively, in trust, to receive the rents, issues and profits thereof, and to apply the same to the erecting or building on some eligible part of the land whereon the testator then resided, an asylum, or marine hospital, to be called "the Sailor's Snug Harbor," for the purpose of maintaining and supporting aged, decrepid, and worn-out sailors, as soon as the said trustees, or a majority of them, should judge the proceeds of the said estate would support fifty of such sailors and upwards; and that the said testator, in his said will, declared his intention to be, that the said estate should at all events be applied to the purposes aforesaid, and no other; and if his said intent could not be carried into effect without an act of incorporation, he therein expressed his desire that the said trustees would apply to the Legislature for such incorporation; and, whereas, the said trustees have represented that the said estate is of considerable value, and if prudently managed, will in time enable them to erect such hospital, and carry into effect the intent of the testator; but that as such trustees, and being also appointed executors of the said will, in virtue of their offices, and only during their continuance in the said offices, they have found that considerable inconveniences have arisen in the management of the said estate, from the changes which have taken place in the ordinary course of the elections and appointments to those offices, and have prayed to be incorporated for the purposes expressed in the said will, and such prayer appears to be reasonable: therefore,

1. Be it enacted by the people of the State of New York, represented in senate and assembly, that John Lansing, Jun., the chancellor of this State, De Witt Clinton the mayor, and Maturin Livingston the recorder of the city of New York, John Murray the president of the chamber of commerce of the city of New York, James Farquhar the president, and Thomas Farmer the first vice-president of the marine society of the city of New York, Benjamin Moore, senior minister of the Episcopal Church in the said city, and John Rogers, senior minister of the Presbyterian Church in the said city, and their successors in office respectively, in virtue of their said offices; shall be, and hereby are constituted and declared to be a body corporate, in fact, and in name, by the name and style of "the Trustees of the Sailor's Snug Harbor in the city of New York;" and by that name they and their successors shall have continual succession, and shall be capable in law of suing and being sued, plead-

ing and being impleaded, answering and being answered unto, defending and being defended, in all courts and places whatsoever, and in all manner of actions, suits, complaints, matters and causes whatsoever; and that they and their successors may have a common seal, and may change and alter the same at their pleasure; and also, that they and their successors, by the name and style aforesaid, shall be capable in law of holding and disposing of the said real and personal estate, devised and bequeathed as aforesaid, according to the intention of the said will; and the same is hereby declared to be vested in them, and their successors in office, for the purpose therein expressed; and shall also be capable of purchasing, holding and conveying any other real and personal estate, for the use and benefit of the said corporation, in such manner as to them, or a majority of them, shall appear to be most conducive to the interest of the said institution.

The second section gives to the trustees the power to make rules and regulations, and to appoint officers for the government and business of the corporation, and provides for the mode of transacting the same.

The third section declares that "this act shall be deemed and taken to be a public act, and be construed in all courts and places, benignly and favorably, for the purposes therein intended."

On the 25th of March, 1814, an act supplementary to the act of incorporation was passed, declaring, that persons holding certain offices should act as trustees, and declaring it to be the duty of the corporation to make an annual report of their funds to the common council of the city, of the state of their funds.

The counsel for the tenants gave in evidence the act of the Legislature of New York, "for relief against absconding and absent debtors," passed the 4th of April, 1786; and a report made to the superior court of judicature of the State of New York, of proceedings under the act against Paul Richard Randall, by which he was declared an absent debtor.

Under this act all the estate, real as well as personal, of Paul Richard Randall, as an absent debtor, of what kind or nature soever the same might be, were, on the 13th of November, 1800, attached, seized, and taken, and were, by the recorder of New York, under and in pursuance of the provisions of the law, upon the 22d of December, 1801, by an instrument of writing under his hand and seal, conveyed to Charles Ludlow, James Brewerton, and Roger Strong, all of the city of New

York; to be trustees for all the creditors of the said Paul Richard Randall, who afterwards duly qualified as trustees.

Subsequently, on the 14th of April, 1808, upon a further application to the recorder of New York, Paul Richard Randall being still absent, other trustees are appointed, according to law, who were, on the same day, qualified to act as trustees.

The demandant gave in evidence the following rules of the supreme court of judicature of the people of the State of New York :

February 17, 1804.

“ In the matter of Paul Richard Randall, an absent debtor.

“ On reading and filing the petition of Alexander Stewart, White Matlack, and Catherine Brewerton, agents and attorneys of the said Paul Richard Randall, and also reading and filing the answer of Charles Ludlow, James Brewerton, and Roger Strong, trustees for all the creditors of the said Paul Richard Randall, to the said petition, and on motion of Mr. Hamilton, attorney of the said Alexander Stewart, White Matlack, and Catherine Brewerton, it is ordered by the Court, that the said trustees pay to the said Paul Richard Randall, or to his said agents and attorneys, for his use, the sum of five thousand five hundred dollars, out of the moneys now remaining in the hands of the said trustees.”

August 9, 1804.

“ In the matter of Paul R. Randall, an absent debtor, and his assignees, etc.

“ On reading and filing the petition of Alexander Phoenix, the attorney and agent for Paul Richard Randall, together with a certified copy of the power of attorney, and the acknowledgments of the trustees and former attorneys of the said Paul, thereunto annexed, and on motion of Mr. Van Wyck, of counsel for the said Alexander, ordered that the rule heretofore, in February term last, made in the said matter, be vacated, and that the said sum of five thousand five hundred dollars, acknowledged to be still remaining in the hands of the said Charles Ludlow, James Brewerton, and Roger Strong, trustees as aforesaid, be paid over by them to the said Alexander Phoenix, as the attorney and agent of the said Paul Richard Randall.”

It appeared in evidence, that Catherine Brewerton died some time in

or about the year of our Lord, 1815, and that Paul R. Randall died some time in the year of our Lord, 1820, Catherine Brewerton, having first, while a widow, made her last will and testament, dated the 5th of June, A. D. 1815, duly executed and attested to pass real estate, and devised among other things as follows, that is to say :

“Secondly, I give, devise and bequeath, all my estate, real and personal, whatsoever and wheresoever, in law or equity, in possession, reversion, remainder or expectancy (excepting such as is herein otherwise specially mentioned), unto my executors hereinafter named, and to the survivor of them, his heirs and assigns forever, upon trust nevertheless for the uses and purposes hereinafter mentioned and intended, that is to say, that my executors shall,” etc.

Upon the trial of the cause in the circuit court the judges were opposed in opinion upon the following points, which were certified to the Court :

I. Whether, inasmuch as the count in the cause is for the entire right in the premises, the demandant can recover a less quantity than the entirety.

II. Whether John Inglis, the demandant, was or was not capable of taking lands in the State of New York by descent, which general question presents itself under the following aspects :

1. Whether, in case he was born before the 4th of July, 1776, he is an alien, and disabled from taking real estate by inheritance.

2. Whether, in case he was born after the 4th of July, 1776, and before the 15th of September of the same year, when the British took possession of New York, he would be under the like disability.

3. Whether, if he was born after the British took possession of New York, and before the evacuation on the 25th of November, 1783, he would be under the like disability.

4. What would be the effect upon the right of John Inglis to inherit real estate in New York, if the grand assize should find that Charles Inglis, the father, and John Inglis, the demandant, did, in point of fact, elect to become and continue British subjects and not American citizens ?

III. Whether the will of Catherine Brewerton was sufficient to pass her right and interest in the premises in question, so as to defeat the demandant in any respect ; the premises being, at the date of the will and ever since, held adversely by the tenants in this suit.

IV. Whether the proceedings against Paul R. Randall, as an absent

debtor, passed his right or interest in the lands in question to, and vested the same in the trustees appointed under the said proceedings, or either of them, so as to defeat the demandant in any respect.

V. Whether the devise in the will of Robert Richard Randall of the lands in question is a valid devise, so as to divest the heir at law of his legal estate, or to affect the lands in his hands with a trust.

The cause was argued by *Mr. Ogden* and *Mr. Webster*, for the demandant, and by *Mr. Talcott* and *Mr. Wirt*, for the tenants. The argument was commenced and concluded by the counsel for the tenants.

Mr. Justice THOMPSON delivered the opinion of the Court.

This case comes up from the circuit court for the southern district of New York, upon several points, on a division of opinion certified by that Court. In the examination of these points, I shall pursue the order in which they have been discussed at the bar.

I. "Whether the devise in the will of Robert Richard Randall, of the lands in question, is a valid devise, so as to divest the heir at law of his legal estate, or to affect the lands in his hands with a trust."

This question arises upon the residuary clause in the will, in which the testator declares: that as to and concerning all the rest, residue and remainder of my estate, both real and personal, I give, devise and bequeath the same unto the chancellor of the State of New York, the mayor and recorder of the city of New York, etc. (naming several other persons by their official description only), to have and to hold all and singular the said rest, residue and remainder of my said real and personal estate, unto them, and their respective successors in office, forever, to, for and upon, the uses, trusts, intents and purposes, and subject to the directions and appointments hereinafter mentioned and declared concerning the same, that is to say: out of the rents, issues and profits of the said rest, residue and remainder of my said real and personal estate, to erect and build upon some eligible part of the land upon which I now reside, an asylum, or marine hospital, to be called "the Sailor's Snug Harbor," for the purpose of supporting aged, decrepid, and worn-out sailors, etc. And after giving directions as to the management of the fund by his trustees, and declaring that it is his intention, that the institution erected by his will should be perpetual, and that the above-mentioned officers for the time being, and their successors, should for-

ever continue to be the governors thereof, and have the superintendence of the same, he then adds, "and it is my will and desire, that if it cannot legally be done, according to my above intention, by them, without an act of the Legislature, it is my will and desire, that they will as soon as possible apply for an act of the Legislature to incorporate them for the purposes above specified. And I do hereby declare it to be my will and intention, that the said rest, residue and remainder of my said real and personal estate, should be at all events applied for the uses and purposes above set forth; and that it is my desire all courts of law and equity will so construe this my said will as to have the said estate appropriated to the above uses, and that the same should in no case, for want of legal form or otherwise, be so construed as that my relations, or any other persons, should heir, possess or enjoy my property, except in the manner, and for the uses herein above specified."

The Legislature of the State of New York, within a few years after the death of the testator, on the application of the trustees, who are also named as executors in the will, passed a law, constituting the persons holding the offices designated in the will, and their successors in office, a body corporate, by the name and style of "the Trustees of the Sailor's Snug Harbor in the city of New York," and declaring that they and their successors, by the name and style aforesaid, shall be capable in law of holding and disposing of the said real and personal estate, devised and bequeathed as aforesaid, according to the intentions of the aforesaid will. And that the same is hereby declared to be *vested* in them and their successors in office for the purposes therein expressed.

If, after such a plain and unequivocal declaration of the testator with respect to the disposition of his property, so cautiously guarding against, and providing for every supposed difficulty that might arise, any technical objection shall now be interposed to defeat his purpose, it will form an exception to what we find so universally laid down in all our books, as a cardinal rule in the construction of wills, that the intention of the testator is to be sought after and carried into effect. But no such difficulty in my judgment is here presented. If the intention of the testator cannot be carried into effect, precisely in the mode at first contemplated by him, consistently with the rules of law, he has provided an alternative, which, with the aid of the act of the Legislature, must remove all difficulty.

The case of the *Baptist Association v. Hart's Executors*, 4 Wheat. 27,

is supposed to have a strong bearing upon the present. This is however distinguishable in many important particulars from that. The bequest there was, "*to the Baptist Association that for ordinary meets at Philadelphia.*" This association not being incorporated, was considered incapable of taking the trust as a society. It was a devise in presenti, to take effect immediately on the death of the testator, and the individuals composing it were numerous and uncertain, and there was no executory bequest over to the association if it should become incorporated. The Court therefore considered the bequest gone for uncertainty as to the devisees, and the property vested in the next of kin, or was disposed of by some other provision in the will. If the testator in that case had bequeathed the property to the Baptist Association on its becoming thereafter, and within a reasonable time incorporated, could there be a doubt but that the subsequent incorporation would have conferred on the association the capacity of taking and managing the fund.

In the case now before the Court, there is no uncertainty with respect to the individuals who were to execute the trust. The designation of the trustees by their official character, is equivalent to naming them by their proper names. Each office referred to was filled by a single individual, and the naming of them by their official distinction was a mere *designatio personarum*. They are appointed executors by the same description, and no objection could lie to their qualifying and acting as such. The trust was not to be executed by them in their official characters, but in their private and individual capacities. But admitting that if the devise in the present case had been to the officers named in the will and their successors, to execute the trust, and no other contingent provision made, it would fall within the case of the *Baptist Association v. Hart's Executors*.

The subsequent provisions in the will must remove all difficulty on this ground. If the first mode pointed out by the testator for carrying into execution his will and intention, with respect to this fund, cannot legally take effect, it must be rejected, and the will stand as if it had never been inserted; and the devise would then be to a corporation, to be created by the Legislature, composed of the several officers designated in the will as trustees, to take the estate and execute the trust.

And what objection can there be to this as a valid executory devise, which is such a disposition of lands, that thereby no estate vests at the death of the deviser, but only on some future contingency? By an exec-

utory devise, a freehold may be made to commence in futuro, and needs no particular estates to support it. The future estate is to arise upon some specified contingency, and the fee-simple is left to descend to the heir at law until such contingency happens. A common case put in the books to illustrate the rule is: if one devises land to a feme sole and her heirs upon her marriage. This would be a freehold commencing in futuro, without any particular estate to support it, and would be void in a deed, though good by executory devise, 2 Black. Com. 175. This contingency must happen within a reasonable time, and the utmost length of time the law allows for this is, that of a life or lives in being and twenty-one years afterwards. The devise in this case does not purport to be a present devise to a corporation not in being, but a devise to take effect in futuro upon the corporation being created. The contingency was not too remote. The incorporation was to be procured, according to the directions in the will, as soon as possible, on its being ascertained that the trust could not legally be carried into effect in the mode first designated by the testator. It is a devise to take effect upon condition that the Legislature should pass a law incorporating the trustees named in the will. Every executory devise is upon some condition or contingency, and takes effect only upon the happening of such contingency or the performance of such condition. As in the case put of a devise to a feme sole upon her marriage. The devise depends on the condition of her afterwards marrying.

The doctrine sanctioned by the Court in Porter's case, 1 Coke's Rep. 24, admits the validity of a devise to a future incorporation. In answer to the argument that the devise of a charitable use was void under the statute 23 Hen. 8, it was said, that admitting this, yet the condition was not void in that case. For the testator devised that his wife shall have his lands and tenements, upon condition that she, by the advice of learned counsel, in convenient time after his death, shall assure all his lands and tenements for the maintenance and continuance of the said free school, and alms men and alms women forever. So that although the said uses were prohibited by the statute, yet the testator hath devised, that counsel learned should advise, how the said lands and tenements should be assured, for the uses aforesaid, and that may be advised lawfully: viz. To make a corporation of them by the king's letters patent, and afterwards, by license, to assure the lands and tenements to them. So if a man devise that his executors shall, by the advice of learned counsel,

convey his lands to any corporation, spiritual or temporal, this is not against any act of parliament, because it may lawfully be done by license, etc., and so doubtless was the intent of the testator, for he would have the lands assured for the maintenance of the free school, and poor, forever, which cannot be done without incorporation and license, as aforesaid; so the condition is not against law: *quod fuit concessum per curiam*.

The devise in that case could not take effect without the incorporation. This was the condition upon which its validity depended. And the incorporation was to be procured after the death of the testator. The devise then, as also in the case now before the Court, does not purport to be a present devise, but to take effect upon some future event. And this distinguishes the present case from that of the *Baptist Association v. Hart's Executors*, in another important circumstance. There it was a present devise, here it is a future devise. A devise to the first son of A., he having no son at that time, is void; because it is by way of a present devise, and the devisee is not *in esse*. But a devise to the first son of A. when he shall have one, is good; for that is only a future devise, and valid as an executory devise. 1 Salk. 226, 229.

The cases in the books are very strong to show, that for the purpose of carrying into effect the intention of the testator, any mode pointed out by him will be sanctioned, if consistent with the rules of law, although some may fail. In *Thellusson v. Woodford*, 4 Ves. Jun. 325, Buller, Justice, sitting with the lord chancellor, refers to, and adopts with approbation, the rule laid down by lord Talbot in *Hopkins v. Hopkins*: that in such cases, (on wills,) the method of the courts is not to set aside the intent because it cannot take effect so fully as the testator desired, but to let it work as far as it can. Most executory devises, he says, are without any freehold to support them; the number of contingencies is not material, if they are to happen within the limits allowed by law. That it was never held that executory devises are to be governed by the rules of law, as to common law conveyances. The only question is, whether the contingencies are to happen within a reasonable time or not. The master of the rolls in that case says, (p. 329,) he knows of only one general rule of construction, equally for courts of equity and courts of law, applicable to wills. The intention of the testator is to be sought for, and the will carried into effect, provided it can be done consistent with the rules of law. And he adds another rule, which has become

an established rule of construction. That if the Court can see a general intention, consistent with the rules of law, but the testator has attempted to carry it into effect in a way that is not permitted, the Court is to give effect to the general intention, though the particular mode shall fail. 1 Peere Wms. 332; 2 Brown's Ch. 51.

The language of Lord Mansfield in the case of *Chapman v. Brown*, 3 Burr. 1634, is very strong to show how far courts will go to carry into effect the intention of the testator. To attain the intent, he says, words of limitation shall operate as words of purchase; implication shall supply verbal omissions. The letter shall give way, every inaccuracy of grammar, every impropriety of terms, shall be corrected by the *general meaning*, if that be clear and manifest.

In *Bartlet v. King*, 12 Mass. Rep. 543, the supreme judicial court of Massachusetts adopt the rule laid down in *Thellusson v. Woodford*, that the Court is bound to carry the will into effect if they can see a general intention consistent with the rules of law, even if the particular mode or manner pointed out by the testator is illegal. And the Court refer with approbation to what is laid down by Powell in his Treatise on Devises 421, that a devise is never construed absolutely void for uncertainty, but from necessity: if it be possible to reduce it to certainty it is good. So also in *Finlay v. Riddle*, 3 Binn. Rep. 162, in the Supreme Court of Pennsylvania, the rule is recognized, that the general intent must be carried into effect, even if it is at the expense of the particular intent.

A rule so reasonable and just in itself, and in such perfect harmony with the whole doctrine of the law in relation to the construction of wills, cannot but receive the approbation and sanction of all courts of justice; and a stronger case calling for the application of that rule can scarcely be imagined than the one now before the Court. The general intent of the testator, that this fund should be applied to the maintenance and support of aged, decrepid, and worn-out sailors, cannot be mistaken. And he seems to have anticipated that some difficulty might arise, about its being legally done in the particular mode pointed out by him. And to guard against a failure of his purpose on that account, he directs application to be made to the Legislature for an incorporation, to take and execute the trust according to his will; declaring his will and intention to be, that his estate should at all events be applied to the uses and purposes aforesaid; and desiring all courts of law and equity so to construe

his will, as to have his estate applied to such uses. And to make it still more secure, if possible, he finally directs that his will should in no case, for want of legal form or otherwise, be so construed, as that his relations, or any other persons, should heir, possess or enjoy his property, except in the manner and for the uses specified in his will.

The will looks therefore to three alternatives :

1. That the officers named in the will as trustees, should take the estate and execute the trust.

2. If that could not legally be done, then he directs his trustees to procure an act of incorporation, and vests the estate in it for the purpose of executing the trust.

3. If both these should fail, his heirs, or whosoever should possess and enjoy the property, are charged with the trust.

That this trust is fastened upon the land cannot admit of a doubt. Wherever a person by will gives property, and points out the object, the property, and the way in which it shall go, a trust is created ; unless he shows clearly, that his desire expressed is to be controlled by the trustee, and that he shall have an option to defeat it. 2 Ves. Jun. 335.

It has been urged by the demandant's counsel, that these lands cannot be charged with the trust in the hands of the heir, because the will directs that they shall not be possessed or enjoyed, except in the *manner* and for the *uses* specified. That the *manner* and the *use* must concur in order to charge the trust on the land. But I apprehend this is a mistaken application of the term *manner* as here used. It does not refer to the persons who were to execute the trust. But to the mode or manner in which it was to be carried into effect, viz., by erecting upon some eligible part of the land an asylum, or marine hospital, to be called "the Sailor's Snug Harbor." And the *uses* were, "for the purpose of maintaining and supporting aged, decrepid, and worn-out sailors." • Whoever therefore takes the land, takes it charged with these uses or trusts, which are to be executed in the manner above-mentioned. And if so, there can be no objection to the act of incorporation, and the vesting the title therein declared. It does not interfere with any vested rights in the heir. He has no beneficial interest in the land. And the law only transfers the execution of the trust from him to the corporation, and thereby carrying into effect the clear and manifest intention of the testator. But being of opinion that the legal estate passed under the will, I have not deemed it necessary to pursue the question of trust, and have

simply referred to it, as being embraced in the point submitted to this Court.

If this is to be considered a devise to a corporation, it will not come within the prohibitions in the statute of wills, 1 Revised Laws 364. For this act of incorporation is, *pro tanto*, a repeal of that statute.

Taking this devise therefore in either of the points of view in which it has been considered, the answer to the question put must be, that it is valid, so as to divest the heir of his legal estate, or at all events, to affect the lands in his hands with the trust declared in the will.

If this view of the devise in the will of Robert Richard Randall be correct, it puts an end to the right and claim of the demandant, and might render it unnecessary to examine the other points which have been certified to this Court, had the questions come up on a special verdict or bill of exceptions. But coming up on a certificate of a division of opinion, it has been the usual course of this Court to express an opinion upon all the points.

It is not however deemed necessary to go into a very extended examination of the other questions, as the opinion of the Court upon the one already considered, is conclusive against the right of recovery in this action.

II. The second general question is, whether John Inglis, the demandant, was or was not capable of taking lands in the State of New York by descent.

This question is presented under several aspects, for the purpose of meeting what at present from the evidence appears a little uncertain, as to the time of the birth of John Inglis. This question as here presented, does not call upon the Court for an opinion upon the broad doctrine of allegiance and the right of expatriation, under a settled and unchanged state of society and government. But to decide what are the rights of the individuals composing that society, and living under the protection of that government, when a revolution occurs; a dismemberment takes place; new governments are formed; and new relations between the government and the people are established.

If John Inglis, according to the first supposition under this point, was born before the 4th of July, 1776, he is an alien; unless his remaining in New York during the war changed his character and made him an American citizen. It is universally admitted, both in the English courts and in those of our own country, that all persons born within

the colonies of North America, whilst subject to the crown of Great Britain, were natural born British subjects, and it must necessarily follow, that that character was changed by the separation of the colonies from the parent state, and the acknowledgment of their independence.

The rule as to the point of time at which the American *ante nati* ceased to be British subjects, differs in this country and in England, as established by the courts of justice in the respective countries. The English rule is to take the date of the treaty of peace in 1783. Our rule is to take the date of the Declaration of Independence. And in the application of the rule to different cases, some difference in opinion may arise. The settled doctrine of this country is, that a person born here, who left the country before the Declaration of Independence, and never returned here, became thereby an alien, and incapable of taking lands subsequently by descent in this country. The right to inherit depends upon the existing state of allegiance at the time of descent cast. The descent cast in this case being long after the treaty of peace, the difficulty which has arisen in some cases, where the title was acquired between the Declaration of Independence and the treaty of peace, does not arise here. *Prima facie*, and as a general rule, the character in which the American *ante nati* are to be considered, will depend upon, and be determined by the situation of the party and the election made at the date of the Declaration of Independence, according to our rule; or the treaty of peace according to the British rule. But this general rule must necessarily be controlled by special circumstances attending particular cases. And if the right of election is at all admitted, it must be determined, in most cases, by what took place during the struggle, and between the Declaration of Independence and the treaty of peace. To say that the election must have been made before, or immediately at the Declaration of Independence, would render the right nugatory.

The doctrine of perpetual allegiance is not applied by the British courts to the American *ante nati*. This is fully shown by the late case of *Doe v. Acklam*, 2 Barn. & Cresw. 779. Chief-Justice Abbott says, "James Ludlow, the father of Frances May, the lessor of the plaintiff, was undoubtedly born a subject of Great Britain. He was born in a part of America, which was at the time of his birth a British colony, and parcel of the dominions of the crown of Great Britain; but upon the fact found, we are of opinion that he was not a subject of the crown

of Great Britain at the time of the birth of his daughter. She was born after the independence of the colonies was recognized by the crown of Great Britain, after the colonies had become United States, and their inhabitants generally citizens of those States. And her father by his continued residence in those States manifestly became a citizen of them." He considered the treaty of peace as a release, from their allegiance, of all British subjects who remained there. A declaration, says he, that a State shall be free, sovereign and independent, is a declaration, that the people composing the State shall no longer be considered as subjects of the sovereign by whom such a declaration is made. And this Court, in the case of *Blight's Lessee v. Rochester*, 7 Wheat. 544, adopted the same rule with respect to the right of British subjects here. That although born before the revolution, they are equally incapable with those born subsequent to that event of inheriting or transmitting the inheritance of lands in this country. The British doctrine therefore is, that the American *ante nati*, by remaining in America after the treaty of peace, lost their character of British subjects. And our doctrine is, that by withdrawing from this country, and adhering to the British government they lost, or, perhaps more properly speaking, never acquired the character of American citizens.

This right of election must necessarily exist, in all revolutions like ours, and is so well established by adjudged cases, that it is entirely unnecessary to enter into an examination of the authorities. The only difficulty that can arise is, to determine the time when the election should have been made. Vattel, B. 1, ch. 3, sec. 33. 1 Dall. 58. 2 Dall. 234. 20 Johns. 332. 2 Mass. 179, 236, 244, note. 2 Pickering 394. 2 Kent's Com. 49.

I am not aware of any case in the American courts where this right of election has been denied, except that of *Ainsley v. Martin*, 9 Mass. 454. Chief-Justice Parsons does there seem to recognize, and apply the doctrine of perpetual allegiance, in its fullest extent. He then declares that a person born in Massachusetts, and who, before the 4th of July, 1776, withdrew into the British dominions, and never since returned into the United States, was not an alien, that his allegiance to the king of Great Britain was founded on his birth, within his dominions, and that that allegiance accrued to the commonwealth of Massachusetts, as his lawful successor. But he adds what may take the present case even out of his rule: "It not being alleged," says he, "that the demandant

has been expatriated, by virtue of any statute or any judgment of law." But the doctrine laid down in this case is certainly not that which prevailed in the Supreme Judicial Court of Massachusetts, both before and since that decision, as will appear by the cases above referred to of *Gardner v. Ward*, and *Kilham v. Ward*, 2 Mass., and of *George Phipps*, 2 Pickering 394, note.

John Inglis, if born before the Declaration of Independence, must have been very young at that time, and incapable of making an election for himself; but he must, after such a lapse of time, be taken to have adopted and ratified the choice made for him by his father, and still to retain the character of a British subject, and never to have become an American citizen, if his father was so to be considered. He was taken from this country by his father before the treaty of peace, and has continued ever since to reside within the British dominions without signifying any dissent to the election made for him; and this ratification, as to all his rights, must relate back, and have the same effect and operation, as if the election had been made by himself at that time.

How then is his father Charles Inglis to be considered? Was he an American citizen? He was here at the time of the Declaration of Independence, and *prima facie* may be deemed to have become thereby an American citizen. But this *prima facie* presumption may be rebutted; otherwise there is no force or meaning in the right of election. It surely cannot be said, that nothing short of actually removing from the country before the Declaration of Independence will be received as evidence of the election; and every act that could be done to signify the choice that had been made, except actually withdrawing from the country, was done by Charles Inglis. He resided in the city of New York at the Declaration of Independence, and remained there until he removed to England, a short time before the evacuation of the city by the British in November, 1783; New York during the whole of that time, except from July to September, 1776, being in possession, and under the government and control of the British, he taking a part and acting with the British; and was, according to the strong language of the witness, as much a royalist as he himself was, and that no man could be more so. Was Charles Inglis under these circumstances to be considered an American citizen? If being here at the Declaration of Independence necessarily made him such, under all possible circumstances he was an American citizen. But I apprehend this would be carrying the rule to

an extent that never can be sanctioned in a court of justice, and would certainly be going beyond any case as yet decided.

The facts disclosed in this case, then, lead irresistibly to the conclusion that it was the fixed determination of Charles Inglis the father, at the Declaration of Independence, to adhere to his native allegiance. And John Inglis the son must be deemed to have followed the condition of his father, and the character of a British subject attached to and fastened on him also, which he has never attempted to throw off by any act disaffirming the choice made for him by his father.

The case of *M'Irvine v. Coxe's Lessee*, 4 Cranch 211, which has been relied upon, will not reach this case. The Court in that case recognized fully the right of election, but considered that Mr. Coxe had lost that right by remaining in the State of New Jersey, not only after she had declared herself a sovereign State, but after she had passed laws by which she pronounced him to be a member of, and in allegiance to the new government; that by the act of the 4th of October, 1776, he became a member of the new society, entitled to the protection of its government. He continued to reside in New Jersey after the passage of this law, and until some time in the year 1777, thereby making his election to become a member of the new government; and the doctrine of allegiance became applicable to his case, which rests on the ground of a mutual compact between the government and the citizen or subject, which it is said cannot be dissolved by either party without the concurrence of the other. It is the tie which binds the governed to their government, in return for the protection which the government affords them. New Jersey, in October, 1776, was in a condition to extend that protection, which Coxe tacitly accepted by remaining there. But that was not the situation of the city of New York; it was in the possession of the British. The government of the State of New York did not extend to it in point of fact.

The resolutions of the convention of New York of the 16th of July, 1776, have been relied upon as asserting a claim to the allegiance of all persons residing within the State. But it may well be doubted whether these resolutions reached the case of Charles Inglis. The language is, "that all persons abiding within the State of New York, and deriving protection from the laws of the same, owe allegiance to the said laws, and are members of the State." Charles Inglis was not, within the reasonable interpretation of this resolution, abiding in the State and

owing protection to the laws of the same. He was within the British lines, and under the protection of the British army, manifesting a full determination to continue a British subject. But if it should be admitted that the State of New York had a right to claim the allegiance of Charles Inglis, and did assert that right by the resolution referred to, still the case of *M'Ilwaine v. Coxe* does not apply.

It cannot, I presume, be denied, but that allegiance may be dissolved by the mutual consent of the government and its citizens or subjects. The government may release the governed from their allegiance. This is even the British doctrine in the case of *Doe v. Acklam*, before referred to. The act of attainder passed by the Legislature of the State of New York, by which Charles Inglis is declared to be forever banished from the State, and adjudged guilty of treason if ever afterwards he should be found there, must be considered a release of his allegiance, if ever he owed any to the State. 1 Greenleaf's Ed. L. N. Y. 26.

From the view of the general question referred to in this Court, the answers to the specific inquiries will, in my judgment, be as follows :

1. If the demandant was born before the 4th of July, 1776, he was born a British subject; and no subsequent act on his part, or on the part of the State of New York, has occurred to change that character; he of course continued an alien, and disabled from taking the land in question by inheritance.

2. If born after the 4th of July, 1776, and before the 15th of September of the same year, when the British took possession of New York, his infancy incapacitated him from making any election for himself, and his election and character followed that of his father, subject to the right of disaffirmance in a reasonable time after the termination of his minority; which never having been done, he remains a British subject, and disabled from inheriting the land in question.

3. If born after the British took possession of New York, and before the evacuation on the 25th of November, 1783, he was, under the circumstances stated in the case, born a British subject, under the protection of the British government,* and not under that of the State of New York, and of course owing no allegiance to the State of New York. And even if the resolutions of the convention, of the 16th of July, 1776, should be considered as asserting a rightful claim to the allegiance of the demandant and his father, this claim was revoked by the act of 1779, and would be deemed a release and discharge of such allegiance, on the

part of the State, and which having been impliedly assented to, by the demandant, by withdrawing with his father from the State of New York to the British dominions, and remaining there ever since, worked a voluntary dissolution, by the assent of the government and the demandant, of whatever allegiance antecedently existed, and the demandant at the time of the descent cast was an alien, and incapable of taking lands in New York by inheritance.

4. When Charles Inglis, the father, and John Inglis, his son, withdrew from New York to the British dominions, they had the right of electing to become and remain British subjects. And if the grand assize shall find, that in point of fact they had made such election, then the demandant at the time of the descent cast was an alien, and could not inherit real estate in New York.

III. The next question is, whether the will of Catherine Brewerton was sufficient to pass her right and interest in the premises in question, so as to defeat the demandant in any respect; the premises being at the date of the will, and ever since, held adversely by the tenants in the suit.

Mrs. Brewerton was the sister of Robert Richard Randall, and if the devise in his will is void and cannot take effect, she, as one of his heirs at law, would be entitled to a moiety of the lands in question. She died in the year 1815, having shortly before made her last will and testament, duly executed and attested to pass real estate. By this will she devised and bequeathed all her real and personal estate, whatsoever and wheresoever, in law and equity, in possession, reversion, remainder, or expectancy (except some specific legacies) unto her executors, upon certain trusts therein mentioned. If this will was therefore operative, so as to pass her right to her brother's estate, it will defeat the demandant's right to recover, as to one moiety of the premises in question.

The objection taken to the operation of this will is, that the premises were at the date thereof, and ever since have been held adversely by the tenants in the suit.

The validity of this objection must depend upon the construction of the statute of wills in the State of New York. By that statute (1 N. Y. Rev. Laws 364, sec. 1) it is declared, that any person having any *estate of inheritance*, either in severalty, in coparcenary, or in common, in any lands, tenements, or hereditaments, may at his own free will and pleasure, give or devise the same, or any of them, or any rent or profit

out of the same or out of any part thereof, to any person or persons (except bodies public and corporate), by his last will and testament, or any other act by him lawfully executed.

This being a question depending upon the construction of a State statute, with respect to the title to real property, it has been the uniform course of this Court, to apply the same rule that we find applied by the State tribunals in like cases. 1 Peters 371. This statute upon the point now under consideration has received a construction by the Supreme Court of the State of New York, in the case of *Jackson v. Varick*, 7 Cowen 238. The question arose upon the validity of a devise in the will of Medcef Eden, the younger. The objection was, that at the time of the devise, and of the death of the testator, the premises in question were, and had been for several years before in the adverse possession of the defendant, and that he and those under whom he claimed entered originally, without the consent of the devisor or any one from whom he claimed. The Court say, the facts present the question whether the owner in fee can devise land, which, at the time of the devise and his death, is in the adverse possession of another. That is, whether a person having a right of entry in fee-simple, shall be said to have an estate of inheritance in lands, tenements, or hereditaments in the language of our statute of wills.

It is unnecessary to pursue the course of reasoning which conducted the Court to the conclusion to which it came. The result of the opinion was, that under the comprehensive words used in the act, a right of entry, as well as an estate in the actual seizin and possession of the devisor, was devisable; and that an estate that would descend to the heir is transmissible equally by will. The judge who delivered the opinion adverted to some cases that had arisen in the same Court, wherein a contrary doctrine would seem to have been recognized, but came to the conclusion, that no decision had been made upon the point.

In the case of *Wilkes v. Lion*, 2 Cowen 355, decided in the Court of Errors, in New York, one of the points relied upon by the counsel for the plaintiff in error, was, that this same will of Medcef Eden, the younger, was inoperative as to the premises then in question; they being lands of which he was not seized at the time of his death. I do not find that any direct opinion was given upon this point; but the objection must have been overruled, or the Court could not have come to the conclusion it did.

It is said, however, by the demandant's counsel, that these cases do not apply to the one now before the Court; but only such estate as would descend to the heir of the deviser, and that the premises in question here would not descend to the heirs of Mrs. Brewerton for want of actual seizin. According to the rule laid down in *Watkins on Descents* 23, that where the ancestor takes by purchase, he may be capable of transmitting the property so taken to his own heirs, without any actual possession in himself; but if the ancestor himself takes by descent, it is absolutely necessary, in order to make him the stock or terminus, from whom the descent should now run, and so enable him to transmit such hereditaments to his own heirs, that he acquire an actual seizin of such as are corporeal, or what is equivalent thereto, in such as are incorporeal.

It is very evident, however, that the Court could not have intended to apply this rule to the construction of the statute of wills. For they say, in terms, that the question is, whether a person having a right of entry in lands has an estate of inheritance devisable, according to the provisions of the statute. But under the common law rule referred to, a person having only a right of entry, would not be accounted an ancestor from whom the inheritance would be derived. 2 Black. Com. 209. Such a construction would be in a great measure defeating the whole operation of the act.

The demandant in this case states in his count, that upon the death of Robert R. Randall, the right to the land descended to Paul R. Randall and Catherine Brewerton in moieties. So that, by his own showing, she had a right of entry, which, according to the express terms of the decisions in *Jackson and Varick*, was devisable.

The answer to this question must accordingly be, that the will of Catherine Brewerton was sufficient to pass her right and interest in the premises in question, notwithstanding the adverse possession held by the tenants in this suit, at the date of the will.

IV. The fourth point stated is, whether the proceedings against Paul Richard Randall, as an absent debtor, passed his right or interest in the lands in question to, and vested the same in, the trustees appointed under the said proceedings, or either of them, so as to defeat the demandant in any respect.

Paul R. Randall, as stated in the case, died some time in the year 1820. He and his sister Mrs. Brewerton were the heirs at law to the

estate of their brother Robert Richard Randall. If therefore the will of Mrs. Brewerton operated to pass her right, Paul R. Randall would be entitled to the other moiety. If her will did not operate, then he would be entitled to the whole of his brother's estate.

It does not appear from the case that any objections were made to the regularity of the proceedings against Paul R. Randall, under the absconding debtor act; and indeed the question, as stated for the opinion of this Court, necessarily implies that no such objection existed. The question is, whether his right in the land passed to, and became vested in, the trustees.

As this is the construction of a State law, this Court will be governed very much by the decisions of the State tribunals in relation to it. The question is, whether a right of entry passes under the provisions of the absconding debtor act of the State of New York, 1 Rev. Laws 157. By the first section of the act, the warrant issued to the sheriff commands him to attach, and safely keep, *all the estate, real and personal*, of the debtor. The tenth section authorizes the trustees to take into their hands all the estate of the debtor, whether attached as aforesaid, or afterwards discovered by them; and that the said trustees, from their appointment, shall be deemed *vested* with all the estate of such debtor, and shall be capable to sue for and recover the same. And the trustees are required to sell all the estate, real and personal, of the debtor, as shall come to their hands, and execute deeds and bills of sale, which shall be as valid as if made by the debtor himself.

These are the only parts of the act which have a material bearing upon this point. And the first question that would seem to arise is, whether the term *estate*, as here used, will extend to the interest which the debtor has in lands held adversely. An estate in lands, tenements, and hereditaments, signifies such interest as a person has therein, and is the condition or circumstance in which the owner stands with regard to his property. Coke, sec. 345 a. 2 Black. Com. 103.

The language of the act is broad enough to include a right of entry; and there can be no reason to believe that such was not the intention of the Legislature.

The doctrine of the Court of Common Pleas in England, in the case of *Smith v. Coffin*, 2 H. Black. 461, has a strong bearing upon this question. The language of this absconding debtor act, with respect to the estate of the debtor to which it shall extend, is as broad as that of the

English bankrupt laws, and the same policy is involved in the construction. In the case referred to, the Court say, the plain spirit of the bankrupt law is, that every beneficial interest which the bankrupt has, shall be disposed of for the benefit of his creditors. On general principles, rights of action are not assignable, but that is a rule founded on the policy of the common law, which is averse to encouraging litigation. But the policy of the bankrupt law requires that the right of action should be assignable, and transferred to assignees, as much as any other species of property. Its policy is, that every right, belonging in any shape to the bankrupt, should pass to the assignees.

The estate of the debtor, under the New York statute, becomes vested in the trustees, by the mere act and operation of law, without any assignment.

The Courts in New York have given a literal construction to this act, whenever it has come under consideration, so as to reach all the property of the absconding debtor. In the matter of Smith, an absconding debtor, 16 Johns. 107, the broad rule is laid down that an attachment under this act is analogous to an execution. And in the case of *Handy v. Dobbin*, 12 Johns. 220, when the proceeding was under another statute, 1 Rev. Laws 398, very analogous to the one under consideration, the Court say, there can be no doubt that the constable, under the attachment, could take any goods and chattels which could be levied on by execution. The authority in both cases is the same. And in *Jackson v. Varick*, 7 Cowen 244, it is laid down as a rule admitting of no doubt, that a right of entry may be taken and sold under an execution.

It is said, however, that this right of entry does not pass, because, by the tenth section of the act, it is declared, that the deeds given by the trustees shall be as valid as if made by the debtor, and that the debtor could not make a valid deed of lands held at the time adversely.

This objection does not apply to the case: the question does not arise upon the operation of a deed given by the trustees. The point is, whether the trustees themselves had any interest in these lands: not whether they would give a valid deed for them, before reducing the right to possession. If it should be admitted that they could not, it would not affect the present question. The right is vested in the trustees by operation of law, the act declaring *that the estate shall be deemed vested in them on their appointment*, and that they shall be capable to sue

for and recover the same ; implying thereby that a suit may be necessary to reduce the estate of possession.

Again, it is said, that after such a lapse of time, it is to be presumed that all the debts of Paul R. Randall have been paid, and the trust of course satisfied ; and that the estate thereupon became revested in Paul R. Randall.

This objection admits of several answers. It does not appear properly to arise under the point stated. But the question intended to be put would seem to be, whether the right, being a mere right of entry, passed, and became vested in the trustees. If it did so vest, it could not be revested, except by a reconveyance, or by operation of law, resulting from a performance of the trust, by paying off all the debts of the absent debtor. And whether these debts have been satisfied, is a proper subject of inquiry for the grand assize. There is not enough before this Court to enable it to decide that point. It is a question of fact, and not of law. If it was admitted that all the debts have been satisfied, the effect of such satisfaction would be a question of law. The evidence might probably warrant the grand assize in presuming payment ; but even that may not be perfectly clear. The order of the Court upon the trustees to pay to the agent or attorney of Paul R. Randall five thousand five hundred dollars, out of the money remaining in their hands, does not purport to consider this sum as the surplus after payment of all the debts. It was to be paid out of the moneys remaining in the hands of the trustees, thereby fully implying, that their trust was not closed. And if the fact of payment and satisfaction of the debts is left at all doubtful, this Court cannot say, as matter of law, that the interest in the land became revested in Paul R. Randall. It must depend upon the finding of the grand assize.

It is objected, however, that the defence set up, and embraced in the two last questions, is inadmissible. That in a writ of right, the tenant cannot, under the mise joined, set up title out of himself, and in a third person. That it is a question of mere right between the demandant and the tenant. And it has been supposed, that this is the doctrine of this Court in the case of *Green v. Lister*, 8 Cranch 229. If anything that fell from the Court in that case will give countenance to such a doctrine, it is done away by the explanation given by the Court in *Green v. Watkins*, 7 Wheat. 31 ; and it is there laid down, that the tenant may give in evidence the title of a third person, for the purpose of dis-

proving the demandant's seizin. That a writ of right does bring into controversy the mere right of the parties to the suit, and if so, it, by consequence, authorizes either party to establish by evidence, that the other has no right whatever in the demanded premises; or that his mere right is inferior to that set up against him. And this is the rule recognized in the Supreme Court of New York. In the case of *Ten Eyck v. Waterberry*, 7 Cowen 52, the Court say, that in a writ of right, the mise puts the seizin in issue, as the plea of not guilty in ejectment puts in issue the title, and that under the mise anything may be given in evidence, except collateral warranty. The same rule is laid down by the Supreme Judicial Court of Massachusetts, in the case of *Poor v. Robinson*, 10 Mass. Rep. 131; and such appears to be the well settled rule in the English courts. Booth 98, 115, 112. 3 Wilson 420. 2 W. Black. Rep. 292. 2 Saund. 45 f. note 4. Stearns on Real Actions 227, 228, 372.

The answer to this question will accordingly be in the affirmative, unless the grand assize shall find that the trusts have been fully performed; and if so, the interest in the land will by operation of law become revested in Paul R. Randall.

V. Another point submitted to this Court is, whether, inasmuch as the count in the cause is for the entire right in the premises, the demandant can recover a less quantity than the entirety.

This is rather matter of form, without involving materially the merits of the case. And as the action itself has become almost obsolete, it cannot be very important how the point is settled. I have not therefore pursued the question to see how it would stand upon British authority. The leaning of the Courts in that country is against the action, and against even allowing almost any amendments, holding parties to the most strict and rigid rules of pleading; and it may be that the English Courts would consider, that the recovery must be according to the count. But whatever the rule may be there, I think it is in a great measure a matter of practice, and that we are at liberty to adopt our rule on this subject. And no prejudice can arise to the tenant by allowing the demandant to have judgment for and recover according to the right which, upon the trial, he shall establish in the demanded premises. The cases referred to, showing that a demandant may abridge his plaint, do not apply to a writ of right. This is confined to the action of assize, and authorized by statute 21 Hen. 8, ch. 3. This statute has been adopted

in New York, 1 Rev. Laws 88, but does not help the case. But independent of any statutory provision, I see no good reason why the demandant should not be allowed to recover according to the interest proved, if less than that which he has demanded.

It is the settled practice in the Supreme Judicial Court in Massachusetts, in a writ of entry, to allow the demandant to recover an undivided part of the demanded premises. The technical objection, that the verdict and judgment do not agree with the count, is deemed unimportant; the title being the same as to duration and quality, and differing only in the degree of interest between a sole tenancy and a tenancy in common. The tenant cannot be prejudiced by allowing this. He is presumed to know his own title, and might have disclaimed. The Courts in that State consider, that with respect to the right to renew a part of the land claimed; there is no distinction between a writ of entry and an action of ejectment. 2 Pick. 387. 3 Pick. 52. Nor is it perceived that any well founded distinction, in this respect, can be made between the action of ejectment and a writ of right.

The opinion of the Court upon this point is, that under a count for the entire right, a demandant may recover a less quantity than the entirety.

Mr. Justice JOHNSON.

I concur in the opinion in favor of this devise; but this is one of those cases in which I wish my opinion to appear in my own words.

This case comes up on a certified difference of opinion on five points. I take them in their order on the record, not that in which they were argued. The first, which is a technical question, and of minor importance, I shall pass over.

The second, which depends upon the civil or political relation in which the demandant Inglis stands to the State of New York, has been exhibited under four aspects. The first contemplating him as born in the city of New York before the 4th of July, 1776. The second, as born after that period, but before the British obtained possession of the place of his birth. The third, as born in New York while a British garrison. The fourth, as born an American citizen, before the treaty of peace, but having elected to adhere to his allegiance to Great Britain. In the argument there was a fifth aspect of the question presented, which depended upon the act of confiscation and banishment by the

State against the father of the demandant. On the subject of descent, in Shanks's case, which having been argued first in order, I had prepared first to examine; I have had occasion to remark, that the right being claimed under the laws of the particular State in which the land lies, the doctrines of allegiance, as applicable to the demandant, must be looked for in the law of the State that has jurisdiction of the soil.

In this respect the laws of New York vary in nothing material from those of South Carolina. By the twenty-fifth article of the constitution of New York of 1777, the common law of England is adopted into the jurisprudence of the State. By the principles of that law, the demandant owed allegiance to the king of Great Britain, as of his province of New York. By the revolution that allegiance was transferred to the State, and the common law declares that the individual cannot put off his allegiance by any act of his own. There was no legislative act passed to modify the common law in that respect; and as to the effect of the act of confiscation and banishment, the constitution of the State has in it two provisions which effectually protect the demandant against any defence that can be set up under the effect of that act. The thirteenth article declares that "no member of the State shall be disfranchised or deprived of any of the rights or privileges secured to the subjects of the State by that constitution, unless by the laws of the land or the judgment of his peers." And the forty-first declares, "that no act of attainder shall be passed by the Legislature of the State for crimes other than those committed before the termination of the present war, *and that such acts* (which I construe to mean acts of attainder generally) *shall not work a corruption of blood.*"

I shall therefore answer the second question in the affirmative; that is, that he was entitled to inherit as a citizen, born of the State of New York.

On the third question, there were two points made. 1. That Mrs. Brewerton having never entered, could not devise. 2. That the issue being joined upon the mere right, it was not competent for the tenant to introduce testimony to prove the interest out of the demandant, unless (I presume it was meant) the right be proved to be in the tenant. On the first of these points I am satisfied that the State of New York has not suffered the exercise of the testamentary power to be embarrassed with the subtleties of the English law respecting entries and adverse possessions. The words of their statute of wills are broad enough to

carry any right or interest in lands, and such practically seems to have been the uniform understanding in that State.

On the second point, under this question, the facts seem to furnish a very obvious answer. Whatever be the rule in other cases, and I do not feel myself called upon to say what the rule is, it certainly can have no application here, since it is *through* Mrs. Brewerton that the demandant has to trace his title. Certainly then it must be a good defence, if the tenant can establish that it could not pass through Mrs. Brewerton, if she had prevented its descending by an act of her own, valid to that purpose. That question also I should answer in the affirmative.

On the fourth question, I feel it difficult to give a precise answer. An attachment, and conveyance under it, are equivalent to an execution executed. But then there is reason to believe, that the situation in which we find this attachment is analogous to that of an execution, satisfied without the sale of this particular property levied upon. Then could such an execution interfere with the rights of the heir?

It does not appear to me that this question can be answered until the fact of satisfaction can be affirmed or repelled. It is for or against the demandant, according to that alternative.

The fifth is the material question, and since it has been acknowledged in argument, that this suit was instituted on the authority of the case of the Baptist Association, it is necessary first to determine the doctrine which that case establishes.

The devise there was of lands lying in Virginia; the intended devisee was an unincorporated society, described in the will as meeting at Philadelphia; that society became incorporate under a law of Pennsylvania, not of Virginia, and then brought suit in equity in Virginia, to recover the property devised.

At the hearing, the Court decided upon the single question, "whether the plaintiffs were capable of taking under that will," and accordingly this Court certify an opinion to no other point. Its language is, "that the plaintiffs are incapable of taking the legacy for which this suit was instituted." And, notwithstanding the marginal notes of the reporter to the contrary, that I consider as the only point decided in the cause. What the law of the case would have been, had the attorney-general of Virginia been made a party to the suit, and (I presume also as a necessary inference) had the society been incorporated by Virginia, in order to enable them to take the legacy, this Court expressly declines deciding

(p. 50); and certainly it would have been deciding between parties not before it, had it undertaken in that suit to pass upon the interest in, or power over the subject existing in the State of Virginia. The statute of 43 Elizabeth had been expressly repealed in Virginia, previous to the death of Hart, the testator; and although the learned judge who delivered the opinion of the Court, goes so much at large into the origin, construction and effect of that statute, it could only have been to prove all that the case required to have established, to wit, that it is under that statute alone that, even in England, a court of equity could extend to the complainants the relief which they craved. That statute being repealed in Virginia, it followed that the equity powers of the State Courts, and of consequence that of the Circuit Court of the United States, could no longer be exercised over the subject of the charities embraced in that statute; that the State of Virginia, where the land lay, and not the State of Pennsylvania, stood in the relation of *parens patriæ*, and therefore, that those powers and those rights which the crown exercises over charities in England, in order to sustain and give effect to them, could only be exercised in that case by Virginia.

So far I consider the decision as authority, and so far it would require more than ordinary ingenuity to excite a reasonable doubt of its correctness. I consider it as too plain to be questioned, that the powers which the *Court of Chancery* in Great Britain exercises over bequests of charities, in cases where the interest cannot vest under the rigid rules of law, as applied to other bequests, is vested in that Court by, or rather usurped under the statute of Elizabeth. I am not now speaking, it must be noted, of the power of *the crown* in such cases, but of the portion of the prerogative power over charities now exercised by the Court of Chancery in that kingdom.

I consider it as conclusive to prove the peculiar origin of this power, that there lies no appeal from the decision of the chancellor in charity cases. Cro. Cha. 40, 351. 4 Viner's Abridg. 496. And when cases occur not enumerated in the statute of Elizabeth, or not strictly analogous thereto, the crown still exercises the power of disposing of them by sign manual. See the cases collected in Viner, Charit. Uses, G. 3, and note; also, 7 Ves. 490. So that were the statute of Elizabeth repealed in England to-morrow, I see not by what authority this power could be exercised even there in the Chancery Courts. The history of this branch of the chancellor's jurisdiction proves that it could not be.

The plain object of the act of 43 Elizabeth is to place in commission a troublesome branch of the royal prerogative, and to vest the commissioners with power to institute inquests of office, or by other means to discover charities, or the abuse or misapplication of charities, and to authorize the board to exercise the same reach of discretion over such charities as the crown possessed; subject, however, to a revising and controlling power in the lord chancellor; not a mere judicial power, but a ministerial legislation and absolute power; a power, however, secondary or appellate in its nature, not original. This controlling power being absolute and final, soon swallowed up its parent, and became original and absolute. One judge admitted the precedent of an original bill in a charity case, a second judge satisfied his scruples upon that precedent, and other judges following, regarded it as a settled practice. But in whatever way the power is exercised, whether as original or appellate, no other authority for its exercise has ever been claimed by the chancellor but the 43d Elizabeth.

The correctness of the decision of this Court therefore in the Baptist Association case cannot, I think, be disputed. And yet it does in no wise affect the case now before us. But, it is argued that, if the statute 43 Elizabeth be in force in New York, and its Courts can exercise an original power under it, or if they can pursue the intermediate steps necessary to the exercise of an appellate or revising power (six in number, I think, Lord Coke makes them, 2 Inst.), still it can only be a suit in chancery, in the name of the people, or of their Attorney-General, or of the corporation constituted by them, although vested with all their interest in, or power over the subject.

To me it appears demonstrable, that the 43 Elizabeth introduces no new law of charities, makes none valid not valid before it passed, but simply places the right and power of the Court over charities in other hands. If this were not the case, why should bequests to the universities and great schools, bequests in all cases constituting private, visitors, and bequests to towns corporate (section 2 and 3), hospitals, etc., be excepted from its operation? Why should a more liberal rule be introduced with regard to the enumerated indefinite charities, and the excepted cases remain subject to a more rigid system? Certainly the enumerated exceptions in that statute can lose nothing in point of merit or claim to public protection and indulgence, by comparison with those acted upon by the statute. Indeed, the preamble explicitly confines the

views of the Legislature to enforcing the application of the charities according to the charitable interest of the donor; it is the organization of a machine for carrying that interest into effect, without introducing any new rule of law on the subject of construing, applying, or effectuating that intention.

What then was the law of that day, of the time when the 43 Elizabeth was passed, on the subject of charitable donations? It was a system peculiar to the subject, and governed by rules which were applicable to no other; a system borrowed from the civil law, almost copied verbatim into the common law writers. This will distinctly appear by comparing Domat with Godolphin, in the Orphan's Legacy.

It has been said that there are neither adjudged cases nor dicta of elementary writers on the subject of the law as it stood previous to the 43 Elizabeth; but this I think is not quite correct. In Swinburn on Wills, as well as Godolphin's Orphan's Legacy, both books of great antiquity and of high authority, we find all the rules for construing, enforcing, and effectuating charities which have been maintained and acted upon in the chancery since the 43 Elizabeth, laid down as the existing laws of charitable devises; and yet the statute of Elizabeth is not quoted by either as the authority for their doctrines; but their margins are filled with quotations from books which treat of the civil and common law. God. Orph. Leg., Sec. Ed. 1676, P. 1, ch. 5, sec. 4, p. 17. Swinb. on Wills, P. 1, sect. 16. And in so modern a book as Maddock's Cha., Vol. I. 47, we find the law laid down in these words: "it has been an uniform rule in equity, *before* as well as after the statute of 43 Elizabeth, ch. 4, that where uses are charitable, and the person has in himself full power to convey, the Court will aid a defective conveyance to such uses;" and then goes on to enumerate all that variety of cases to which the English Courts have applied the latitudinous principle, that the statute of charitable uses supplies all the defects of an assurance which the donor was capable of making, even to a devise by a lunatic.

Nor are these authors without adjudications to sustain the position, that the law was such *before* as well as after the statute 43 Elizabeth. Rolt's Case in Moore, p. 855, was the case of a will which occurred long before the statute of Elizabeth passed. The devise was of land not in use, and not devisable by law or custom; so that had it been to an individual, it had been clearly void. Accordingly, the heir at law

entered; yet, after the statute of Elizabeth, it was hunted up and returned upon inquest, under the statute; and the lord chancellor on an appeal, having called in the aid of the *two common law chief justices*, they all held it a good limitation or appointment. Now there never has been a time when a subsequent statute, general in its provisions, as was that of charitable uses, could divest a right legally descended upon an heir at law. It follows, that the devise must have been good without the aid of that statute; this decision took place in Court twenty years after the date of the statute.

So also in Revett's Case in the same book, p. 890, when the will was made and the death of the devisor took place in 1586, about seven years before the statute of 43 Elizabeth, and there had been no surrender, the land being copyhold, so that the devise to the charity was clearly void if made to an individual, and accordingly the younger son entered; the charity was enforced against a purchaser from the heirs, under the idea that it was good as an appointment; clearly in pursuance of the rule, that wherever the donor has power to convey, and manifestly intends to convey, the law will make good every deficiency in favor of charities.

And in the case of Sir Thomas Middleton, which also happened before the statute, and where the legal defect lay in the legal insufficiency of the party in interest, and which was not a case of devise, yet it was held good.

It is true Perkins gives an instance of a very early date (40 Edw. 3; see Perkins, sec. 510), of a devise to a society not incorporated with power to purchase, in which the devise was held void; but on that case it may be remarked, that as the clergy had an exclusive possession of the Court of Chancery for many years after (to 26 Henry 8), it is easy to perceive how the law of charities came to be improved to what it appears to have been at the date of the cases quoted from Moore. And there are two other remarks applicable to the cases in Perkins. In a modified sense those devises are held to be void even at this day, and to need the aid of a royal prerogative still existing in the Court, to relieve the devisees against the rules of the common law. It is obvious that property, devised to charities under such circumstances as prevent its vesting by the rules of the common law, is placed in a situation analogous to that of escheat, and afterwards disposed of under the king's sign manual, according to his conscience, actual or constitutional; so

that in a trial at *common law*, such devise would be held void, unless aided by prerogative power.

And, secondly, there is this difference between the case in Perkins and the present case, that the former is expressed in words which contemplate vesting presently; the latter, in words which contemplate a future vesting: which I consider an all important feature in the present case, and one which may give validity to the present devise, without resorting to the aid of those principles which appear peculiar to charitable bequests.

But as a charity, to be governed by the law of the State of New York, it appears to me almost idle to view this case with reference to any other rule of decision than their own adjudications. The case of the Trustees of New Rochelle, 8 Johns. Ch. Rep., p. 292, was a case of greater difficulties than the present; for there the devise is immediate in presenti, to a devisee having no capacity to take at the time. The Legislature afterwards gave that capacity, and the Court held the devise valid; nor is it unimportant in that case to observe, that the case in Ambler 422, of the devise to "the poor inhabitants of St. Leonard's Shore-Ditch," is recognized as authority; as well as that of the *Attorney-General v. Clarke*, in the same book, 651.

Now this decision seems full to these points: 1. That the Legislature of that State can, *ex post facto*, give a capacity to take a charity, where there was no such capacity existing at the time of devise over, is a case where the future existence of that capacity was not contemplated by the testator. 2. That an act of incorporation, with capacity to take, dispenses with the presence of the representative of the State, in a suit to recover such a charity.

What more can be required in the present case, especially where the devisee is the party demandant?

It is no objection to the authority of the New Rochelle case, that it was a suit in equity; for in a case like the present, where nothing is wanting but a competent party to sue or be sued, whenever that party comes in esse, there can be no reason why the suit should not be at law, if courts of law are competent to give relief. Had the devise been void in the case referred to, the estate must have vested in the legal representative, and could no more have been shaken in equity than at law.

But I have said, that the defendant here might dispense with the aid of the peculiar principles of the law of charities; and my opinion dis-

tinctly is, that the devise is good upon general principles, in every respect, unless it be in the time of vesting; then it is not restricted within the legal limits, since the Legislature may, by possibility, never constitute the corporation contemplated in the will.

It is in general true, that where there is a present immediate devise, there must exist a competent devisee, and a present capacity to take. But it is equally true, that if there exists the least circumstance from which to collect the testator's contemplation or intention of anything else than an immediate devise to take effect in *presenti*, then, if confined within the legal limits, it is good as an executory devise.

This is the case of a devise to an infant in *ventre sa mere*; and this the ground of the distinction in Hobart 33, of a present devise to a corporation where it is or is not in progress towards positive existence.

Now the present case is one clearly of an alternative devise to such and such official characters, if by virtue of that devise they can take in perpetuity and succession; and if not, then to them when constituted a body politic by positive statute. Here is clearly contemplated a future vesting, to depend on a capacity to take, to be created by a legislative act; and if the passing of that legislative act had been restricted by the will, in point of time, to the lives of the individuals filling those offices at the time of the death of the testator, on what possible ground could the devise have been impeached?

Does then the law invalidate the devise for want of such restriction, or some other equivalent to it? It is perfectly clear that the law of England does not, and never did, as relates to charities; at least where there has been no previous disposition. In this respect it seems to constitute an exception to the law of executory devises; as is implied in the general reference to the prerogative of the crown to give it legal efficiency, by his sign manual, and as is distinctly recognized in the case of the Trustees of New Rochelle, in the Courts of New York; a case in which the plaintiffs might as well have waited forever upon the legislative will, as in the present case.

There may be a reason for this distinction, since it depends upon the sovereign will to prevent the perpetuity at once; and the presumption is, that the Legislature will not delay to do that which it ought to do. And whence at last arises this rule against perpetuities? It is altogether an act of judicial legislation, operating as a proviso to the statute of wills; a restriction upon the testamentary power. The authority from

which the exception emanated could certainly limit it so as to prevent its extension to an object under the care of the sovereign power.

Upon the whole, I am of opinion that the act of incorporation was at least equivalent to the king's sign manual, and vested a good legal estate in the tenant. That although in the interval it should have descended upon the heir, it descended subject to be divested and passed over by that exercise of prerogative power. But I perceive no necessity for admitting that it ever descended upon the heir; since the right of succession seems rather to be in the commonwealth in the case of charities, as *parens patriæ*.

Mr. Justice STORY.

This cause was argued with great ability and learning at the last term of this Court, and has been held under advisement until this time. In the interval, I have prepared an opinion upon all the points argued by counsel; and upon one of those points of leading importance, I have now the misfortune to differ from a majority of my brethren. Upon another leading point, that of the alienage of the demandant, my opinion coincides generally with that of the majority of the Court; but the reasons, on which it is founded, are given more at large than in that now delivered by my brother Thompson. Under these circumstances, I propose to deliver my opinion at large upon all the points argued in the cause, mainly in the order in which they were discussed by the counsel. It is not without reluctance that I deviate from my usual practice of submitting in silence to the decisions of my brethren, when I dissent from them; and I trust, that the deep interest of the questions, and the novelty of the aspect under which some of them are presented, will furnish an apology for my occupying so much time.

The first point is, whether the devise in the will of Robert R. Randall of the lands in question, is a valid devise, so as to divest the heir at law of his legal estate, or to affect the lands in his hands with a trust.

In considering this question, it appears to me that this Court is to look into the terms of the will, and to construe it according to the intention of the testator. That intention has been justly said to constitute the pole star to guide Courts in the exposition of wills. When the intention is once fairly ascertained, it is wholly immaterial that it cannot be carried into effect by the principles of law; for our duty is to interpret, and not to make wills for testators.

In looking at the terms of the present devise, it appears to me clear, that the testator's intention was to vest in certain persons, in their official, and not in their private capacity, all the residue of his estate for a certain charity stated in the devise. The language is, "I give and bequeath the same unto the chancellor of the State of New York, the mayor and recorder of the city of New York, the president of the chamber of commerce," etc., etc. Did he by these terms mean to devise to the individuals who then occupied these offices, the estate in question, or to the persons who might hold them at the time of his death, or to the persons who might successively from time to time hold them? It was certainly competent for him to devise to them personally, and in their private capacity, by their official description. If a testator were by his will to give an estate to the bishop of New York for life, or to him and his heirs, without giving him his Christian or surname, there is no doubt that the devise might well take effect, as a devise to the then incumbent in office, as a *descriptio personæ*. The law does not require, to make a devise or legacy valid, that the party should be designated by his name of baptism or surname. It is sufficient if he be pointed out by any description, leaving no room for doubt as to the identity and certainty of the person. A devise to the eldest son of A. is just as good as if his name were given. A devise to the present President of the United States could be just as good as if his name were written at large in the will. The maxim of law is, that the designation must be certain as to the person to take; and *id certum est, quod certum reddi potest*. There is no doubt, then, that the chancellor, mayor and recorder, etc., etc., of New York might take as individuals, if such were the intention of the testator. I go farther and say, that if the testator did intend the present devise to them in their private characters, they would take not merely an estate for life in the premises, but an estate in fee. My reason is, that the scope and objects of the charity, being perpetual, require that construction of the will to carry into effect the intention of the testator.*

But the difficulty is in arriving at the conclusion upon the terms of the will, that the testator did mean any devise to them in their private capacities. It is manifest from his language, that he did not devise to the then chancellor, mayor and recorder, etc., etc., in their private capacities, because his language is, that it is to the chancellor, etc., etc.,

* Cruise's Digest. Devise, ch. 11, sect. 72.

“for the time being, and their respective successors in the said offices forever.” It is then a devise to them, as officers, during their continuance in office, and the estate is to go to their successors in office *forever*; so that none of the devisees are to take any certain estate to themselves, but only while they continue in office. It is said that the Court may reject the latter words, if inconsistent with the avowed intention and objects of the will. If the other language of the will required an interpretation of these words different from the ordinary meaning, there might be good ground for such an argument; but that the devise will, in point of law, become ineffectual if they are not rejected, furnishes no ground for the Court to exclude them. Words which are sensible in the place where they occur, and express the testator’s intention, are not to be rejected because the law will not carry into effect that intention. If it were otherwise, courts of law would make wills, and not construe them. But what ground is there to say, that the words “for the time being,” and “their successors in office” ought to be rejected? The former clearly designate what chancellor, mayor and recorder, etc., etc., are meant. How then can the Court take one part and reject the other part of the description? How can the Court say that the testator meant the then incumbents in office, when he has spoken of them as the incumbents for the time being? His intention clearly is that the charity shall be a perpetuity. He devises to the successors in office *forever*. They are to be the administrators of the charity forever. Upon what ground can the Court exclude the successors from the administration of the charity, when the testator has so designated them? Why may we not equally well exclude the present incumbents, as the future? Both are named in the will; both are equally within the view of the testator of equal regard. Suppose all the other incumbents had died, or had been removed from office, is there a word in the will that shows that they or their heirs could still act as trustees, when they ceased to possess office, in exclusion of the actual incumbents? If not, how can the Court say that it will defeat the main intention as to the administrators, and yet fulfil the charity as the testator designed it should be executed?

But this exposition does not rest on a single clause of the will. It pervades it in all the important clauses. In another clause of the will the testator directs that the trustees shall administer the charity “in such manner as the said trustees, or a majority of them, may from time to time, or *their successors in office may from time to time direct.*” And

again, the testator adds, "it is my intention that the institution hereby directed and created should be *perpetual*, and that the above-mentioned officers for the time being, and their successors should forever continue, and be the governors thereof, and have the superintendence of the same." Here is a most deliberate re-statement of his intention and objects. The governors and administrators of his charity are not to be the then incumbents in office, but the officers for the time being; not the individuals when out of office, but *their successors* in office. What right then can this Court have to say that the successors in office shall not be governors? Would it not be a plain departure from the express intention and solemn declarations of the will? The testator seems to have been apprehensive, that after all there might be some impediment in carrying his intention into effect. What then does he provide? That his intention shall be disregarded? That provisions of his will, as to *successors*, etc., etc., shall be disregarded or rejected? No, so far from it, that he goes on to provide for the emergency, so as to give full effect to his intention. His words are, "that it is my will and desire, that if it cannot be legally done, according to my above intention, by them (the trustees) without an act of the Legislature, it is my will and desire that they will, as soon as possible, apply for an act of the Legislature to incorporate them for the purposes above specified." So that the successors in the manner above-mentioned constituted a primary, as well as a perpetual object of the devise. It seems to me so plain and clear upon the language of the will, that the testator never abandoned the intention of having the trustees take in their official and not in their private capacity, that with great deference to the judgment of others, I am unable to perceive any ground on which to rest a different opinion.

If this is so, then it is next to be considered whether such devise is void at law. I am spared the necessity of going at large into that question, by the decision of this Court in the case of the *Trustees of the Philadelphia Baptist Association v. Hart's Executors*, 4 Wheat. Rep. 1, where the subject was very amply discussed; and for reasons, in my judgment unanswerable, it was there decided that such a devise was void at law. Upon that occasion I had prepared a separate opinion; but that of the Chief Justice was so satisfactory to me, that I did not deem it necessary to deliver my own.

If the devise was void at law at the time when it was to have effect, viz., at the death of the testator, the subsequent act of the Legislature

of New York could not have any effect to divest the vested legal title of the heirs of the testator. The devise was not a devise to a corporation not in esse, and to be created in futuro. It was a devise in presenti, to persons who should be officers at the death of the testator, and to their successors in office. The vesting of the devise was not to be postponed to a future time, until a corporation could be created. It was to take immediate effect; and if the trustees could not exercise their powers in the manner prescribed by the testator, they were to apply to the Legislature for an act of incorporation. Assuming, then, that a devise *per verba de futuro*, to a corporation not in esse, which is to take effect when the corporation should be created, would be good, and vest, by way of executory devise, in the corporation when created, as seems to have been Lord Chief Justice Wilmot's opinion (Wilmot's Opinion, p. 15); it is a sufficient answer that such is not the present case. From the other report of the same case, *Attorney-General v. Downing*, Amb. 550, 571, and *Attorney-General v. Bowyer*, 3 Ves. 714, 727, I should deduce the conclusion, that the case turned upon the peculiar doctrines of the Court of Chancery in respect to charities; and that Lord Camden's opinion was founded on that. His judgment is not, as far as I know, in print; and whether he thought that *at law* a devise in futuro to an executory corporation would be good, does not appear. In the case before him he acted upon it as a charitable *trust*, not as a devise of the legal estate.*

But it is said, that there are cases in which it has been held, that a devise to persons in their official capacity is good to the party in his natural capacity; and that it is not true, that, because the devisees cannot take in succession, they cannot take at all: a case from Brook's Abridgment, title Corporation, pl. 34, is relied on. There the principal point was of a different nature: whether a corporation composed of a master and fraternity, could present the master to a benefice. And Pollard, J. on that occasion said, "if J. S. is dean of P., I may give land to him by the name of dean, etc., and *his successors*, and to J. S. and his *heirs*, and there he shall take as dean, and also as a private man; and he is *tenant in common with himself*." Now, the plain meaning of this is, that because he took one moiety in his official capacity to him and his successors, that did not disable him to take the other moiety to him and his *heirs*, but he held the latter in his private capacity. An-

* See also, 1 Roll. Ab. Devise, H. sec. 1. Com. Dig. Devise, K.

other case is from Co. Litt. 46, b, where it is said, if a lease for years be made to a bishop and his successors, yet his executors and administrators shall have it in *autre droit*; for regularly no chattel can go in succession in case of a *sole* corporation, no more than if a lease be made to a man and his heirs, it can go to his heirs.* Now, in the case of a sole corporation, it is manifest that the intention is to give the chattel to the actual incumbent in office, for his life, and he is entitled to hold it beneficially. But no chattel can pass in succession; and then the question arises, whether the Court will declare the gift void, as to the residue of the term, or consider the gift absolute. The construction adopted has been to consider the intent to be executed *cy pres*; and, as the testator intended to give the whole, to vest the term absolutely in the bishop, and then by operation of law it would go to his assigns. But this is a case of a *sole* corporation, where the party is capable to take in his corporate, as well as in his natural capacity for life. The present is a case of aggregate persons, not capable of taking in a corporate capacity. To give the estate to them in their natural capacity, and for life only, would defeat the testator's intention; for he meant a perpetuity of trust, and to persons in office, however often the incumbents might change: to give them, in their natural capacities, an estate for life when not officers, would defeat the primary object which he had in view. He meant no beneficial interest to any incumbent, but a charitable trust to a succession of official trustees.†

It is also said, that in a will a particular may be made to yield to a more general intent. Certainly it may; but then the difficulty in the application of this rule to the present case is, that the argument insists upon a construction which I cannot but deem an overthrow of the general, to subserve an intent not indicated. Because the testator has expressed an intent to be carried into effect one way, which cannot consistently by law be so; and the Court can see another way, by which he might have carried it into effect, if he had thought of it; it does not follow that the Court can do that which the testator might have done, and new model the provisions of the will. If a testator should, *per verba de presenti*, devise an estate to a corporation not in esse, and he knew the fact, or mistook the law, the Court could not construe the words as *de futuro*, and declare it a good devise to a corporation to be

* See Co. Litt. 9, a.

† See 2 Preston on Estates, 5, 6, 7, 46, 47, 48. Com. Dig. Estates, a. 2.

created in *futuro*. The case in 1 Roll. Abridg. Devise, H. l. 50, is decisive of that. The general intention here appears to me to be to create a perpetual trust in certain trustees in succession, for charity ; and I can perceive no particular intent, as distinguishable from that general intent. The perpetuity, the succession and the trusteeship, are in his view equally substantial ingredients. 'So far from allowing any other than the official trustees to administer it, he even points out that if the trust cannot be executed by them, the estate, if it descends to his heirs, shall descend clothed with a trust. And he even appoints the same trustees and *their successors in office* executors of his will.

I come now to the other part of the question, whether, if the devise be void at law, the estate in the hands of the heirs is affected with the trust in favor of the charity. It appears to me most manifest, that it is affected by the trust, if we consult either the intention of the testator or the express terms of the will. The closing paragraph of the will is, in my view of it, decisive, as creating an express trust in the heirs. "It is," says the testator, "my desire, all courts of law and equity will so construe this my said will, as to *have the estate appropriated to the above uses* ; and that the same should in no case, for want of form or otherwise, be construed as that my relations, or any other persons, should heir, possess, or enjoy my property, *except in the manner and for the uses herein above specified.*"

If no trustees had been named in the will to execute the charity, it seems to me very clear that these terms would have created a trust in the heirs. There cannot, as I think, be a doubt, that independent of the statute of mortmain, 9 Geo. 2, ch. 26, the present devise would be held a good charitable devise, and would be enforced in equity, at least since the statute of 43d of Elizabeth of charitable uses. *The case of White v. White ; of Attorney-General v. Downing*, Amb. Rep. 550, 571 ; *of Attorney-General v. Tancred*, Amb. 351, S. C. 1 Eden's Rep. 10 ; and *of Attorney-General v. Bowyer*, 3 Ves. 714, 717, would alone be decisive ; but there are many others to the same effect.* Whether the statute of 43 Elizabeth is in force in the State of New York, or whether, independent of any enactment, a court of equity could enforce this as a charitable trust in the exercise of its general jurisdiction, or as the

* See note on Charitable Uses, 4 Wheat. Rep., Appendix, 1, 11, 12. *Coggeshall v. Felton*, 7 Johns. Cha. Rep. 292. *Kirkbank v. Hudson*, 7 Price, 212. Duke Charitable Uses, by Bridgman, p. 361, 374, 375, 390.

delegate, for this purpose, of the parental prerogative of the State; or whether such Court could hold it utterly void, it is unnecessary for us to consider; that point may well enough be left to the decision of the proper State tribunal, when the case shall come before it. At present I do not think it necessary to say more, than that if the trust be utterly void, then the heirs would by operation of law take the legal estate stripped of the trust. If the trust be good, then it is knit to the estate, and the heirs take it subject to the trust.

But it is said, that if the trust be valid, the Legislature had a perfect right to enforce it, and their act of incorporation amounts to a legal execution of the trusts, and vests the estate in the corporation. Now, whatever may be the rights of the State, as *parens patriæ*, to enforce this charity, it can enforce it only as a trust. If the legal estate is vested in the heirs subject to the trust, the Legislature cannot by any act, *ipso facto*, divest that legal title, and transfer it to the corporation. It is one thing to enforce a charitable trust, and quite another thing to destroy the legal rights of the parties to which it is attached. If the devise had been to certain trustees by name, upon trust for the charity; could the Legislature have a right to divest the legal title? The case of the trustees of *Dartmouth College v. Woodward*, 4 Wheat. Rep. 518, in its principles, bears against such a doctrine. The right to enforce the trust and operate upon the legal estate is a right to be exercised by judicial tribunals, and not by legislative decrees. The doctrine of the Supreme Court of New York is, that the Legislature thereof has no authority to divest vested legal rights.*

But I cannot admit that the act of incorporation was intended to have such an effect; it has no terms which divest the legal title of the heirs; it merely incorporates the trustees and their successors, and clothes them with the usual powers to carry the trust into effect. It presupposes that the estate was already vested in them by the will. They are made "capable in law of holding and disposing of the estate" devised by the will. It is true that the uses are added, "and the same (estate) is hereby declared to be vested in them and their successors in office for the purposes therein (in the will) expressed." But this was not, as I think, intended to vest the estate in them as a legislative investiture; but to de-

* *Dash v. Van Cleeck*, 7 Johns. Rep. 477. *Bradshaw v. Rogers*, 20 Johns. Rep. 103. *Catlin v. Jackson*, 8 Johns. 520. *Terrett v. Taylor*, 9 Cranch 93. *Wilkinson v. Leland*, 2 Peters 627, 657.

clare that the estate was vested in them *for the purposes of the charity*, and not otherwise. The preamble of the act too shows, that the trustees did not ask to have the estate vested in them, but that inconveniences had arisen in the management of the estate from the changes of office. This is very strong to show that the Legislature acted solely for the purpose of avoiding such inconveniences, and not to give them an estate to which they then had no title, and which they then professed to have in their management.

In every view, therefore, in which I can contemplate this point, I feel compelled to say that the devise, if a valid devise, is not a devise valid so as to divest the heir at law of his legal estate; but that the devise can have effect, if at all, only as a trust for a charity fastened on the legal estate in his hands.

In this opinion as to the nature and effect of the devise, in which I have the misfortune to differ from that of the Court, I am authorized to say that I have the concurrence of the Chief-Justice.

Another question is, whether the demandant was or was not capable of taking lands in the State of New York by descent? And this question is presented upon four different aspects of the facts.

In order to explain the views which I take of this part of the case, it will be necessary to state some general principles upon the subject of alienage. The rule commonly laid down in the books is, that every person who is born within the ligeance of a sovereign is a subject; and, *e converso*, that every person born without such allegiance is an alien. This, however, is little more than a mere definition of terms, and affords no light to guide us in the inquiry what constitutes allegiance, and who shall be said to be born within the allegiance of a particular sovereign; or in other words, what are the facts and circumstances from which the law deduces the conclusion of citizenship or alienage. Now, allegiance is nothing more than the tie or duty of obedience of a subject to the sovereign under whose protection he is; and allegiance by birth, is that which arises from being born within the dominions and under the protection of a particular sovereign. Two things usually concur to create citizenship; first, birth locally within the dominions of the sovereign; and, secondly, birth within the protection and obedience, or in other words, within the ligeance of the sovereign. That is, the party must be born within a place where the sovereign is at the time in full possession and exercise of his power, and the party must also at his birth

derive protection from, and consequently owe obedience or allegiance to the sovereign, as such, *de facto*.^{*} There are some exceptions, which are founded upon peculiar reasons, and which, indeed, illustrate and confirm the general doctrine. Thus, a person who is born on the ocean, is a subject of the prince to whom his parents then owe allegiance; for he is still deemed under the protection of his sovereign, and born in a place where he has dominion in common with all other sovereigns. So the children of an ambassador are held to be subjects of the prince whom he represents, although born under the actual protection and in the dominions of a foreign prince. Birth within the dominions of a sovereign is not always sufficient to create citizenship, if the party at the time does not derive protection from its sovereign in virtue of his actual possession; and on the other hand, birth within the allegiance of a foreign sovereign, does not always constitute allegiance, if that allegiance be of a temporary nature within the dominions of another sovereign. Thus the children of enemies, born in a place within the dominions of another sovereign, then occupied by them by conquest, are still aliens; but the children of the natives, born during such temporary occupation by conquest, are, upon a reconquest or reoccupation by the original sovereign, deemed, by a sort of postliminy, to be subjects from their birth, although they were then under the actual sovereignty and allegiance of an enemy.

The general principle of the common law also is, that the allegiance thus due by birth, cannot be dissolved by any act of the subject. It remains perpetual, unless it is dissolved by the consent of the sovereign or by operation of law. Upon the cession of a country it passes to the new sovereign; for the sovereign power is competent to transfer it by a voluntary grant. Upon the conquest of the country it passes by operation of law to the conqueror; who as sovereign *de facto* has a right to the allegiance of all who are subdued by his power, and submit to the protection of his arms. Upon the abdication of the government by one prince, it passes by operation of law to him whom the nation appoints as his successor. Thus, by the conquest of England, the allegiance of all Englishmen passed to William the Conqueror; by the abdication of James II. their allegiance passed to William of Orange; and by the cession to France of the Anglo-French provinces of England, the allegiance of the natives passed to the new sovereign. These cases are

^{*} See Calvin's case, 7 Co. 1. *Doe ex dem. of Duroure v. Jones*, 4 Term. Rep. 300. 1 Bl. Comm.

plain enough upon the doctrines of municipal law, as well as upon those which are recognized in the law of nations.

But a case of more nicety and intricacy is, when a country is divided by a civil war, and each party establishes a separate and independent form of government. There, if the old government is completely overthrown, and dissolved in ruins, the allegiance by birth would seem by operation of law to be dissolved, and the subjects left to attach themselves to such party as they may choose, and thus to become the voluntary subjects, not by birth but by adoption, of either of the new governments. But where the old government, notwithstanding the division, remains in operation, there is more difficulty in saying, upon the doctrine of the common law, that their native allegiance to such government is gone, by the mere fact that they adhere to the separated territory of their birth, unless there be some act of the old government virtually admitting the rightful existence of the new. By adhering to the new government, they may indeed acquire all the rights, and be subject to all the duties of a subject to such government. But it does not follow that they are thereby absolved from all allegiance to the old government. A person may be, what is not a very uncommon case, a subject owing allegiance to both governments, *ad utriusque fidem regis*. But if he chooses to adhere to the old government, and not to unite with the new, though governing the territory of his birth, it is far more difficult to affirm, that the new government can compel or claim his allegiance in virtue of his birth, although he is not within the territory, so as to make him responsible criminally to its jurisdiction. It may give him the privileges of a subject, but it does not follow that it can compulsively oblige him to renounce his former allegiance. Perhaps the clearest analogy to govern such cases is to bring them within the rule that applies to cases of conquest, where those only are bound to obedience and allegiance who remain under the protection of the conqueror.

The case of the separation of the United States from Great Britain, is perhaps not strictly brought within any of the descriptions already referred to; and it has been treated on many occasions, both at the bar and on the bench, as a case *sui generis*. Before the revolution, all the colonies constituted a part of the dominions of the king of Great Britain, and all the colonists were natural born subjects, entitled to all the privileges of British born subjects, and capable of inheriting lands in any part of the British dominions, as owing a common allegiance to the

British crown. But in each colony there was a separate and independent government established under the authority of the crown, though in subordination to it. In this posture of things the revolution came; and the Declaration of Independence acting upon it, proclaimed the colonies free and independent States; treating them not as communities, in which all government was dissolved, and society was resolved into its first natural elements, but as organized States, having a present form of government, and entitled to remodel that form according to the necessities or policy of the people. The language of the Declaration of Independence is, that Congress solemnly publish and declare, "that these united colonies are, and of right ought to be, free and independent *States*; that they are absolved from all allegiance to the *British crown*; and that all political connection between them and the *State* of Great Britain is and ought to be totally dissolved; and that as free and independent *States*, they have full power to levy war, conclude peace, contract alliances, establish commerce, and do all other acts and things which independent States may of right do." It is plain that this instrument did not contemplate an entire dissolution of all government in the States; which would have led to a subversion of all civil and political rights, and a destruction of all laws. It treated the colonies as *States*, and simply absolved them from allegiance to the British crown, and all political connection with Great Britain. The States so considered it: some of them proceeded to act and legislate before the adoption of any new constitution; some of them framed new constitutions; and some of them have continued to act under their old charters down to the present day. They treated the case as it was treated in England upon the abdication of James II., and provided for it, by resorting to that ultimate sovereignty residing in the people, to provide for all cases not expressly provided for in their laws.

Antecedent to the revolution, the inhabitants of the colonies, whether natives of the colonies, or of any other of the British dominions, owed no allegiance except to the British crown. There was not, according to the common law, any secondary or subordinate allegiance to the colony itself, or the government therein established, as contradistinguished from the general allegiance to the British crown. When, therefore, the Declaration of Independence absolved all the States from allegiance to the British crown, it was an act of one party only. It did not bind the British government, which was still at liberty to insist, and did insist

upon the absolute nullity of the act, and claimed the allegiance of all the colonists as perpetual and obligatory. From this perplexing state of affairs, the necessary accompaniment of a civil war, it could not escape the notice of the eminent men of that day, that most distressing questions must arise; who were to be considered as constituting the American States, on one side, and "the State of Great Britain," on the other? The common law furnished no perfect guide, or rather admitted of different interpretations. If, on the one side, it was said, that all persons born within a colony owed a perpetual allegiance to that colony, whoever might be the sovereign, the answer was, that the common law admitted no right in any part of the subjects to change their allegiance without the consent of their sovereign, and that the usurpation of such authority was itself rebellion; for "*nemo potest exuere patriam*," was the language of the common law. In respect to persons who were not natives, but inhabitants only, in a colony, at the time of the assertion of its independence, there was still less reason to claim their allegiance. If they were aliens, there was no pretence to say that they could be bound to permanent allegiance against their will. If they were born in England, or elsewhere in the British dominions, out of the colony, they were as little bound to permanent allegiance; because they inhabited, not as colonists, but as British subjects. In respect to both these cases (*i. e.*, foreigners and British subjects), no colony, upon assuming to be an independent State, could, against their will, make them members of the State. It would be an exercise of authority not flowing from its rights as an independent State, and at war with the admitted rights of other nations, by the law of nations, to hold the allegiance of their own subjects. In order, therefore, to make such persons members of the State, there must be some overt act or consent on their own part, to assume a character; and then, and then only, could they be deemed, in respect to such colony, to determine their right of election.

Under the peculiar circumstances of the revolution, the general, I do not say the universal, principle adopted, was to consider all persons, whether natives or inhabitants, upon the occurrence of the revolution, entitled to make their choice, either to remain subjects of the British crown, or to become members of the United States. This choice was necessarily to be made within a reasonable time. In some cases that time was pointed out by express acts of the Legislature; and the fact of *abiding* within the State after it assumed independence, or after some

other specific period, was declared to be an election to become a citizen. That was the course in Massachusetts, New York, New Jersey, and Pennsylvania. In other States, no special laws were passed; but each case was left to be decided upon its own circumstances, according to the voluntary acts and conduct of the party. That the general principle of such a right of electing to remain under the old, or to contract a new allegiance, was recognized, is apparent from the cases of the *Commonwealth v. Chapman*, 1 Dall. Rep. 53. *Caignet v. Pettit*, 2 Dall. Rep. 234. *Martin v. The Commonwealth*, 1 Mass. Rep. 347, 397. *Palmer v. Downer*, 2 Mass. Rep. 179, note. S. C. Dane's Abridg., ch. 131, art. 7, sec. 4. *Kilham v. Ward*, 2 Mass. Rep. 236, and *Gardner v. Ward*, 2 Mass. Rep. 244, note; as explained and adopted in *Inhabitants of Cummington v. Inhabitants of Springfield*, 2 Pick. Rep. 394, and note. *Inhabitants of Manchester v. Inhabitants of Boston*, 16 Mass. Rep. 230, and *M'Ilwaine v. Cox's Lessee*, 4 Cranch 209, 211.* But what is more directly in point: it is expressly declared and acted upon, by the Supreme Court of New York, in the case of *Jackson v. White*, 20 Johns. Rep. 313. It appears to me that there is sound sense and public policy in this doctrine; and there is no pretence to say, that it is incompatible with the known law or general usages of nations. The case of *Ainslie v. Martin*, 9 Mass. Rep. 454, proceeds upon the opposite doctrine; but that case stands alone, and is incompatible with prior as well as subsequent decisions of the same Court; and so it has been treated by Chancellor Kent, in his learned commentaries. 2 Kent's Comm. 35, 52.

Another point, which necessarily arises in the present discussion, is, whether a party, who, by operation of law, or by the express enactment of the Legislature of a State, after the Declaration of Independence, became a citizen of the State, could afterwards, by any act of his own, *flagrante bello*, divest himself of such citizenship. It is clear, that during the war; however true it might be that the State by its own declaration, or by his consent, might hold him to his allegiance as a citizen, and absolve him from his former allegiance; such declaration or consent could be binding only between him and the State, and could have no legal effect upon the rights of the British crown. The king might still claim to hold him to his former allegiance, and until an actual renunciation on his part, according to the common law, he remained a

* See also Chase J. in *Ware v. Hylton*, 3 Dall. 225, 1 Peters's Condens. Rep. 199. *Hebron v. Colchester*, 5 Day's Rep. 169.

subject. He was, or might be held to be, bound *ad utriusque fidem regis*. In an American court, we should be bound to consider him as an American citizen only; in a British court, he could, upon the same principle, be held a British subject. Neutral nations would probably treat him according to the side with which he acted at the time when they were called upon to decide upon his rights. It might well be presumed, that from various motives, numbers would change sides during the progress of the contest; some because they were compulsively held to allegiance, and others, again, from a sincere change of opinion. It is historically true, that numbers did so change sides. The general doctrine asserted in the American courts, has been, that natives who were not here at the Declaration of Independence, but were then, and for a long while afterwards remained, under British protection, if they returned before the treaty of peace, and were here at that period, were to be deemed citizens. If they adhered to the British crown up to the time of the treaty, they were deemed aliens; some of the cases already referred to are full to this point, and particularly *Kilham v. Ward*, and *Gardner v. Ward*. In respect to British subjects, not natives, who joined us at any time during the war, and remained with us up to the peace, a similar rule of deeming them citizens has been adopted. The cases in 9 Mass. Rep. 454; 2 Pick. Rep. 394; and 5 Day Rep. 169, are to this effect. The ground of this doctrine is, that each government had a right to decide for itself who should be admitted or deemed citizens; that those who adhered to the States and to Great Britain, respectively, were, by the respective governments, deemed members thereof; and that the treaty of peace acted by necessary implication upon the existing state of things, and fixed the final allegiance of the parties on each side, as it was then, *de facto*. Hence the recognition on the part of Great Britain of our independence, by the treaty of 1783, has always been held by us as a complete renunciation on her part of any allegiance of the then members of the States, whether natives or British born. And the same doctrine has been in its fullest extent recognized in the British courts, in the case of *Thomas v. Acklam*, 2 Barn. & Cress. 779. Lord Chief-Justice Abbott, in delivering the opinion of the Court on that occasion, said, that the declaration in the treaty, that the States were free, sovereign, and independent States, was a declaration that the *people composing the State* shall no longer be considered as subjects of the sovereign by whom such declaration is made. And in a subsequent case,

Auchmuty v. Mulcaster, 8 Dowl. & Ryl. Rep. 593; S. C. 5 Barn. & Cress. 771; the same Court held, that a native American, born before the Declaration of Independence, who adhered to the royal cause during the war, still retained his allegiance, and was to be deemed, not an American citizen, but a British subject. Mr. Justice Bayley, on that occasion, said, "the king acknowledges the United States to be free, sovereign, and independent States." "Who are made independent? The States. Does not this mean the persons who, *at that time* (of the treaty), composed the American States?" 8 Dowl. & Ryl. 603. And again he added, "the treaty, etc., etc., made those persons who were at that period of time adhering to the then American government or constituted authorities, free of their allegiance to the crown of these kingdoms, and left them to adopt their allegiance to the new government."

In *Kilham v. Ward*, 2 Mass. Rep. 236, and *Gardner v. Ward*, 2 Mass. Rep. 244, note, a like doctrine was avowed. The language of the Court there was, that by the treaty those who by their adherence and residence had remained the subjects of the king of Great Britain on the one part, and those who by their adherence and residence were then the people of the United States on the other part, were reciprocally discharged from all opposing claims of allegiance and sovereignty. This doctrine appears to me so rational and just, and founded upon such a clear principle of reciprocity and public policy, that it is, I own, extremely difficult for me to admit that the treaty does not indispensably require that interpretation. It is true that the treaty contains no renunciation on our part, of the allegiance of any of our citizens who had adhered to the British crown; but the reason of the omission is obvious. Great Britain claimed the allegiance of all the colonists as British subjects; she renounced by the treaty that claim as to all who *then adhered* to the American States. We acquiesced in that result; and must, in the absence of any stipulation to the contrary, be deemed to admit the allegiance to have been retained, of all whose allegiance was not expressly or impliedly renounced.

I am compelled, however, to admit the language of this Court in *M'Ilvaine v. Cox's Lessee*, 4 Cranch 209, 214, leads to an opposite conclusion. There is no doubt that the treaty of peace does not ascertain who are citizens on the one side, or subjects on the other. That is a matter partly of law and partly of fact; but when the fact is ascertained that the party was *de facto*, at the time, under the allegiance of, and adhering to either government, he is to be treated as a subject of that

government, and as such, a party to the treaty. What right have the American States to say that all persons shall be deemed citizens who, at any time previous to the treaty, were deemed citizens under their laws; any more than Great Britain has, to hold all persons subjects whom she had previously deemed subjects, in virtue of their original allegiance. Each party must, I think, be presumed to deal with the other upon the footing of equal rights as to allegiance, and to act upon the *status in quo* the treaty found them. If, however, the case of *M'Ilvaine v. Cox's Lessee* is to be deemed not an administration of local law, but of universal law and the interpretation of treaties, it overthrows the reasoning for which I contend. I cannot admit its universality of application; on the contrary, sitting in Massachusetts, I should feel myself constrained to re-examine the doctrine as applicable to that State, upon a point which affected her political rights and her soil, and which the Courts of the State had the most ample jurisdiction to entertain and determine. In New York there is no decision either way; and it seems to me, therefore, that it is fit to be re-examined upon principle. I adopt the suggestion of Lord Chief-Justice Abbott in *Doe ex d. Thomas v. Acklam*, 2 Barn. & Cress. 798, that the inconvenience that must ensue from considering any large mass of the inhabitants of a country to be at once citizens and subjects of two distinct and independent States, and owing allegiance to each; would, if the language of the treaty could admit of any doubt of its effect, be of great weight toward the removal of that doubt. The treaty ought to be so construed, as that each government should be finally deemed entitled to the allegiance of those who were at that time adhering to it.*

With these principles in view, let us now come to the consideration of the question of alienage in the present case. That the father and mother of the demandant were British born subjects, is admitted. If he was born before the 4th of July, 1776, it is as clear that he was born a British subject. If he was born after the 4th of July, 1776, and before the 15th of September, 1776, he was born an American citizen, whether his parents were at the time of his birth British subjects or American citizens. Nothing is better settled at the common law than the doctrine that the children even of aliens born in a country, while the parents are resident there under the protection of the government,

* See also 1 Wood. Lect. 382. Dane's Abridg., ch. 131, art. 7.

and owing a temporary allegiance thereto, are subjects by birth. If he was born after the 15th of September, 1776, and his parents did not elect to become members of the State of New York, but adhered to their native allegiance at the time of his birth, then he was born a British subject. If he was in either way born a British subject, then he is to be deemed an alien, and incapable to take the land in controversy by descent; unless he had become at the time of the descent cast an American citizen, by some act sufficient in point of law to work such a change of allegiance.

His parents being born British subjects, it is incumbent upon those who set up the defence, to establish, that having a right of choice, his parents elected to become American citizens. This is attempted to be deduced by operation of law, from certain resolutions and acts of the government *de facto* of the State of New York. As early as the 15th of September, 1776, his parents joined the British troops in New York, and remained under the protection of the British arms during the war. At the close of the war his father withdrew (his mother being then dead) with the British authorities; and he continued ever afterwards under the protection and allegiance, *de facto*, of the British crown. So far as the acts, therefore, of the parents, manifested by a virtual adherence to the British side, go, they negative any intentional change of native allegiance. But it is said that they were bound to make their election in a reasonable time. I agree to this; but the effect of the omission to manifest an election in favor of the State of New York, was in my judgment decisive of their adhering to the allegiance of their native sovereign. But if it were otherwise, if the election to remain British subjects must be affirmatively established; still, I think, in point of law, under all the circumstances, an election by taking the British protection in September, 1776, was within a reasonable time; and the case of *Jackson v. White*, 20 Johns. Rep. 313, in my judgment warrants such a conclusion.

But it is said that the ordinance of the 16th of July, 1776, which declares "that all persons *abiding* within the State of New York, and deriving protection from the laws of the same, owe allegiance to the said laws, and are members of the State," by necessary conclusion and operation of law made the parents of the demandant American citizens; because they were then *abiding* within the State and deriving protection from its laws. Now, assuming that the convention of the State of New

York had plenary powers for this purpose, so as to bind a British subject not born in New York to allegiance to the State, from the mere fact of his local residence at the time (a proposition that is encumbered with many difficulties), the term "abiding," as here used, has never been construed to exclude the right of election of persons who were inhabitants at that period, to adhere to the old, or contract a new allegiance. The case of *Jackson v. White*, 20 Johns. Rep. 313, is decisive of that.

We must then give a rational interpretation to the word, consistent with the rights of parties, and the accompanying language of the ordinance. By "abiding" in the ordinance is meant not merely present inhabitants, but present inhabitancy coupled with an intention of permanent residence. This is apparent from the next clause of the ordinance, where it is declared, "that all persons passing through, visiting, or making a *temporary stay* in the State being entitled to the protection of the laws during the time of such passage, visitation, or temporary stay, owe during the same allegiance thereto." Their "*temporary stay*" is manifestly used in contradiction to "abiding," and shows that the latter means permanent intentional residence. So Mr. Chief-Justice Spencer, in *Jackson v. White*, 20 Johns. Rep. 313, 326, considered it. He says, "residence in this State prior to that event (the Declaration of Independence) imported nothing as regards the election or determination of such residents to adhere to the old or adopt the new government. The *temporary stay* mentioned in the resolution of the convention passed only twelve days after the Declaration of Independence by Congress, and within five days after the adoption of the declaration by the convention of this State, clearly imports, that such persons who were resident here without any intention of *permanent residence*, were not to be regarded as members of the State;" they had a right to a reasonable time therefore, after the ordinance was passed, to decide whether, with reference to the new government, they would adopt a permanent residence in the State, and to become members thereof.

A similar declaration is to be found in the statute of 1777 of Massachusetts, and there the term "abiding" has been construed not only to apply to an intention of permanent residence, but of a prospective abiding.* The reasoning in the *Commonwealth v. Chapman*, 1 Dall. Rep. 53, persuasively conducts us to a similar conclusion. This ordi-

* See opinion in note. 2 Pick. Rep. 394, 395.

nance, then, cannot be deemed to dissolve the native allegiance of the parents of the demandant, unless it shall be clearly established that they intended a permanent residence in New York, and to become members of the State under the new government, anterior to their assuming British protection in September, 1776.

But even admitting that his parents did elect to become citizens of New York before the 15th of September, 1776, still I am of opinion that the demandant, if he was born after the British took possession of the city of New York, in September, 1776, while his parents were under the protection of, and adhering to the British government *de facto*, was to all intents and purposes an alien born. To constitute a citizen, the party must be born not only within the territory, but within the ligeance of the government. This is clear from the whole reasoning in Calvin's Case, 7 Co. 6, a. 18, a. b.* Now in no just sense can the demandant be deemed born within the ligeance of the State of New York, if, at the time of his birth, his parents were in a territory then occupied by her enemies and adhering to them as subjects, *de facto*, in virtue of their original allegiance.

The act of the 22d of October, 1779, which confiscates the estate of the parents of the demandant, throws great light upon this part of the subject; it demonstrates that they were deemed to be then adhering to the British, the enemies of the State. It begins with a preamble reciting that "divers persons holding or claiming property within this State have voluntarily been adherent to the said king (of Great Britain), his fleets and armies, enemies to this State and the said other United States, with intent to subvert the government and liberties of this State, and of the said other United States, and to bring the same into subjection to the crown of Great Britain; by reason whereof the said persons have severally justly forfeited all right to the protection of this State, and to the benefit of the laws under which such property is held or claimed." It further declares that the public safety requires "that the most notorious offenders should be immediately hereby convicted and attainted of the offence aforesaid, in order to work a forfeiture of their respective estates, and invest the same in the people of this State." It then enacts, "that John Murray, earl of Dunmore, etc., etc., Charles Inglis of the said city (of New York), and Margaret his wife (the parents

* See also Com. Dig. Alien. Bac. Abridg. Alien. A.

of the demandant), etc., etc., be, and each of them are hereby severally declared to be *ipso facto* convicted and attainted of the offence aforesaid ;” and then declares their estates forfeited. In the second section it enacts that the same persons “shall be and hereby are declared to be forever banished from this State, and each and every of them, who shall at any time hereafter be found in any part of this State, shall be and hereby is adjudged and declared guilty of felony, and shall suffer death.”

This act deserves an attentive consideration on several accounts. It is apparent, upon its face, that it is not an act which purports to be an attainder of citizens of the State only, on account of their treason in adhering to the public enemies ; for it embraces persons who never were, nor were pretended to be citizens ; neither does it affect to confiscate the property on account of the alienage of the persons named therein, by way of escheat. The persons described as subjects of attainder are, “persons holding or claiming property within this State,” which description equally applies to citizens and British subjects, and may include foreigners of other nations. It seems, indeed, a summary exercise of the ultimate power of sovereignty, in inflicting the penalty of confiscation upon the property of enemies, *jure belli*. But it demonstrates clearly the sense of the Legislature, that the persons named therein were at that time voluntary adherents to the British crown, and enemies of the State ; and it affords a very cogent presumption of such adherence from the time that they first came under British protection. It farther denounces such persons as enemies or traitors, who have forfeited all right to the protection of the State, and punishes them by a sentence of perpetual banishment, and makes their residence within the State a capital felony.

Such a sentence, under such circumstances, must be deemed on the part of the State, a perpetual renunciation of the allegiance of those persons, and to deprive them of the rights, and to absolve them from the duties of citizens. There can be no allegiance due where the sovereign expressly denies all protection, and compels the party to a perpetual exile. In this view of the matter, the demandant’s parents were by the sovereign act of the State itself absolved from all future allegiance, even if they had antecedently owed any to the State. In this state of things, the treaty of 1783 found the father adhering to the British crown as a native-born subject.

What then is the operation of the treaty of 1783 ? It is clear to my mind, that the father of the demandant must be considered as a party

to that treaty on the British side. I say this upon the presumption, which is not denied, that he was then adhering to the British crown; and that he was there recognized and protected as a subject owing allegiance to the British crown. In this state of things the treaty must, upon the grounds which I have already stated, be deemed to operate as an admission that he was in future to owe no allegiance to the State of New York, but he was to be deemed a British subject.

The question then arises as to what was the operation of the treaty upon his son, the demandant, who was then an infant of tender years, and incapable of any election on his own part. It appears to me, that upon principles of public law, as well as of the common law, he must, if born a British subject, be deemed to adhere to, and retain the national allegiance of his parents, at the time of the treaty. Vattel considers the general doctrine to be, that children generally acquire the national character of their parents (Vattel, B. 1, ch. 19, sec. 212, 219); and it is certain, both by the common law and the statute law of England, that the demandant would be deemed a British subject. The argument itself assumes that the demandant now acts officially in that character, and that ever since his arrival of age he has adhered to his British allegiance.

Upon the whole, upon the point of alienage as presented in the case, the following are my opinions under the various postures of the facts:

1. That if the demandant was born before the 4th of July, 1776, he was born a British subject.

2. That if he was born after the 4th of July, 1776, and before the 15th of September, 1776, he was born an American citizen; and that it makes no difference in this respect, whether or not his parents had at the time of his birth, elected to become citizens of the State of New York, by manifesting an intention of becoming permanently members thereof, in the sense which I have endeavored to explain.

3. That if the demandant was born after the 15th of September, 1776, when the British took possession of New York, and while his parents were there residing under the protection of, and adhering to the British crown as subjects, *de facto*, he was born a British subject, even though his parents had previously become citizens of the State of New York.

4. That if the demandant was born after the 15th of September, 1776, and could be deemed (as I cannot admit) a citizen of the State of New

York in virtue of his parents having, before the time of his birth, elected to become citizens of that State, still his national character was derivative from his parents, and was *under the peculiar circumstances of this case*, liable to be changed during the Revolutionary War; and that if his parents reverted to their original character as British subjects, and adhered to the British crown, his allegiance was finally fixed with theirs by the treaty of peace.

5. That it was competent for the British government to insist, at all times during the Revolutionary War, upon retaining the allegiance of all persons who were born or became subjects; and for the American States to insist in the like manner. But that the treaty of peace of 1783 released all persons from any other allegiance than that of the party to whom they then adhered, and under whose allegiance they were then, *de facto*, found. That if the demandant's father was at that time so adhering, it was a final settlement of his allegiance on the British side; and that the demandant, unless born after the 4th of July, 1776, and before the 15th of September, 1776, remained, to all intents and purposes, a British subject.

6. That if the case of *M'Ilvaine v. Coxe's Lessee*, 4 Cranch 209, should be thought to have overturned this doctrine so that it is no longer re-examinable, still that in this case the parents had a right to elect to which government they would adhere; and that a period up to the 15th of September, 1776, was not an unreasonable time for that purpose; and that unless some prior, clear act of election could be shown, the adherence to the British from the 15th of September, to the close of the war, afforded strong evidence to repel the presumption of any prior election to become citizens, arising from the fact of *abiding* in the State up to that period.

From these views, meaning to be understood to leave any disputed facts open for inquiry (although no other facts seem in dispute, except the actual period of the birth of the demandant), my judgment would be that the demandant was, unless he was born between the 4th of July, and the 15th of September, 1776, an alien at the time of the treaty of 1783, and has ever since remained so. I agree to the doctrine in *Dawson's Lessee v. Godfrey*, 4 Cranch 321, that the right to inherit depends upon the existing state of allegiance at the time of the *descent cast*, and not merely upon a community of allegiance at the time of birth; and the same doctrine is recognized in the fullest manner in the British

courts.* If the demandant then was an alien at the time of the descent cast, he is incapable to inherit the estate in point of law.

But it has been suggested as matter of doubt, whether alienage of the demandant can be taken advantage of or rejected on the mise joined. This objection cannot in my opinion be maintained ; it is laid down in the books that everything in bar upon the merits may be given in evidence under the mise, except collateral warranty ; so it is said in Brooks's Ab. Droit 48 ; and Booth on Real Actions 112. That also seems to have been the opinion of the Court in *Tyssen v. Clarke*, 2 Wils. Rep. 541. Whether the proposition can be maintained in its general latitude, it is unnecessary now to consider ; but it is certainly necessary for the demandant to prove his title as set forth in the writ. If he claims by descent from an ancestor who was seized, he must show that he is heir, and capable to take by descent. The seizin of the ancestor is nothing without establishing his heirship. The cases of *Green v. Lister*, 8 Cranch 229, and *Green v. Watkins*, 7 Wheat. Rep. 28, are decisive that in a writ of right the title and mere right of each party are in issue ; and each may establish that the title of the other wholly fails. If, therefore, the demandant has no title by descent, the tenant may show it ; for it goes to the very foundation of his claim.

In this connection it may be well to dispose of another objection, which was much pressed at the argument. It is this : the demandant in his count alleges the seizin of Robert R. Randall, and makes title by descent to the premises as his next collateral heir on the part of his mother. At the death of Robert R. Randall, he left a brother Paul R. Randall, and a sister, Catherine Brewerton, on whom the alleged right to the lands descended in moieties, and *through whom* (though not *from* whom) the demandant deduces his title by descent, they having died without issue. The tenants offered evidence to establish that Catherine Brewerton had disposed of her right in the premises by will ; and that the right of Paul R. Randall also had been transferred during his lifetime. Now the objection is, that this evidence is inadmissible, because it is an attempt to set up the title of third persons, to defeat a recovery in a writ of right, which is inadmissible. The cases of *Green v. Lister*, 8 Cranch 229, and *Green v. Watkins*, 7 Wheat. Rep. 28, have been relied on to support this objection. Nothing is better settled in this Court

* *Doe ex dem. Thomas v. Acklam*, 2 Barn. & Cress. 779.

than the doctrine that a better title in third persons cannot be set up to defeat a recovery in a writ of right, because that writ brings into controversy and comparison the titles of the parties only ; but it is perfectly consistent with this doctrine, that the tenant may show that the title set up by the demandant is in fact no title at all. One material allegation in the present count is its seizin of Robert R. Randall the ancestor ; and this seizin is admitted, and indeed constitutes a part of the title of both parties in the present case. Another material allegation is, that the *right* to the demanded premises *descended* to the demandant as heir. Now, it is clear upon the general principles of pleading, that what is essential to the demandant's right, as stated in his count, must, when that right is denied by the issue, be proved by the demandant, and may be disproved by the tenant. If, therefore, the demandant be incapable of taking as heir by descent, although there be a *right*, that may be shown by the tenant ; as if he be an alien, because it defeats the asserted *descent* of the title. On the other hand, if the heirship be admitted, and the *right* was parted with by the ancestor, or by any other person, upon whom it intermediately devolved before it could reach the demandant, that, for a better reason, may be shown, because it shows that no *right* or *title* descended at all. Both are necessary to establish the demandant's claim ; there must be a *right* or title subsisting, capable of descent, and a capacity in the demandant to take as heir. If the ancestor has actually parted with his whole right and title in the premises by a legal conveyance, how can it be said that there remains any *descendible right* in him ? If his right has been parted with by any intermediate heir by a legal conveyance, how can it be said to have devolved upon the demandant ? The true and real distinction is this : if the demandant shows any right, as stated in his count to have descended to him from his ancestor, the tenant cannot show that there is a better right subsisting in a third person, under whom he does not claim, for that does not disprove the title of the demandant as asserted in his writ ; and if the demandant's title, such as it is, is better than the tenant's, then the demandant ought to recover ; but the tenant may show that the demandant has no right whatsoever by descent, for the possession of the tenant is sufficient against any person who does not show any right, or a better right. And this, as I understand it, is the doctrine in *Green v. Watkins*, 7 Wheat. Rep. 28. Here, title in third persons is offered, not to prove that there is a *better* outstanding title, but that no right whatsoever

descended to the demandant, as he claims in his count. It seems to me that it is clearly admissible.

The next point is whether the will of Catherine Brewerton was sufficient to pass her right and interest in the premises in question, so as to defeat the demandant in any respect; the premises being at the date of the will, and ever since, held adversely by the tenants in the suit.

If this point were to be decided with reference purely to the common law of England, there might be some reasons for doubt. The question whether a right of entry was under the British statute of wills devisable, seems never to have been directly decided until a recent period. There is indeed to be found in prior cases, many dicta going to affirm the doctrine that such a right of entry is not devisable. Such seems to have been the opinion of Lord Holt in *Bunker v. Cook*, 11 Mod. R. 122, and of Lord Eldon in *Attorney-General v. Vigor*, 8 Ves. 282, as well as of other judges in former times, whose dicta are collected and commented on in *Goodright v. Forrester*, 8 East's Rep. 552, 566, and 1 Taunt. Rep. 604.* There are also dicta the other way; and at all events there is reasoning which leads to the conclusion, that in modern times the judges have been disposed to give a far more liberal construction to the statutes, and to hold that whatever is descendible is devisable. The cases of *Jones v. Roe*, 3 Term. Rep. 88, and *Goodtitle d. Gurnall v. Wood*, Willes's Rep. 211, 3 Term. Rep. 94, by Lord Kenyon, are most material. In *Goodright v. Forrester*, 8 East's Rep. 552, the Court of King's Bench held a right of entry not devisable. But when that case came before the Court of the Exchequer Chamber in Error, Lord Chief-Justice Mansfield very much doubted that point, and the case was finally decided on another. But it is the less necessary to consider this question upon the English authorities, because it has undergone an express adjudication in the State of New York, upon the construction of their own statute of wills. The statute of New York enacts that any person having an estate of inheritance in lands, tenements, and *hereditaments*, shall have a right to devise them. In *Jackson v. Varick*, 7 Cowen's Rep. 238, the Supreme Court of New York, upon very full consideration, held, that under this statute a right of entry being an hereditament, was devisable. And this Court in *Waring v. Jackson*, 1 Peters's Rep. 571, understood it to be the settled rule in that State that an adverse

* See also Com. Dig. Devise, M.

possession did not prevent the passing the property by devise. This then being a point of local law, upon the construction of a statute of the State, according to the uniform course of this Court in cases of that nature we should hold it decisive, whatever original doubts might otherwise have surrounded it. But as one, I confess myself well satisfied with that decision upon principle. It is rational and convenient; and if I should have felt difficulty in arriving at it through the authorities, I should not be inclined to disturb it when made.

It has been said that the present case differs from that in 7 Cowen's Rep. 238 in this, that the demandant claims *through*, but not *under* Mrs. Brewerton, not as her heir, but as heir of Robert R. Randall; and that the estate was not descendible to her *heirs* according to the known principles of the common law, as she was never seized of the premises, but to Robert's heirs, as the person last seized. That is true; but it does not alter the application of the principle of law. If Mrs. Brewerton had been possessed of a reversion by descent from Robert R. Randall, and she had died before the life estate fell in, it would not have gone to her heirs, but to *his*. And yet there is no doubt that she might grant such a reversion, or devise it, and it would pass by her will to the devisee, and thus interrupt the descent. So, if Mrs. Brewerton had a right of entry in the premises, and she could devise it, it is of no consequence that it would not, if undevised, have passed to her heirs; for having the *jus disponendi*, when she exercises it it passes her right to her devisee, and so interrupts the descent to the heirs of Robert R. Randall. It appears to me, therefore, that as to the moiety of Mrs. Brewerton it passed under her will, and that the demandant, in any view of his claim, has no title to a moiety of the demanded premises. A right of entry may well pass under the devise of an hereditament.*

The next question is, whether the proceedings against Paul R. Randall as an absent and absconding debtor passed his right or interest to the other moiety in the lands in question to, and vested the same in the trustees appointed under the same proceedings, so as to defeat the demandant in any respect.

The answer must depend upon the true construction of the absconding debtor acts of 1786 and 1801, as compared with those proceedings. At the time of those proceedings, the premises were in the adverse pos-

* See *Coffin v. Smith*, 2 H. Bl. 444.

session of the tenants; and consequently Paul R. Randall had only a right of entry. And the question is, whether that right of entry passed by the statutes to the trustees; and if so, whether it did not by operation of law revest in him after all these proceedings were *functi officio*, his debts being paid, and the surplus paid over to him.

At the common law a right of entry is clearly not grantable or assignable. The party has, in the sense of the common law, no *estate* in lands of which he is disseized; but his estate is said to be turned to a right, and can be recoverable only by an entry or an action. In the meantime he has not any estate in the lands, but he has merely the right to the estate. For this doctrine it is necessary to do no more than to refer to Littleton, sec. 347; Co. Litt. 214 and 345, a. b.; Preston on Estates 20, and Com. Digest, Assignment, C. 1, 2, 3, and Grant, D.* Unless it shall appear that the common law has been differently construed in New York, or altered by some local statute, the same rule must be presumed to prevail there; for, by the constitution of that State, the common law forms the basis of its jurisprudence. No case has been cited in which the rule of the common law on this subject has been overturned, or in which it has been decided that the word "estate" includes a right of entry, *proprio vigore*.

But it is said that by the law of New York a right of entry is attachable, and may be taken and sold on execution; and that an attachment under the absconding debtor acts of 1786 and 1801, is deemed analogous to an execution.† It may, doubtless, well be so deemed in a general sense; but it by no means necessarily follows that because there is such an analogy, therefore, whatever may be taken in execution may be taken on such attachment, or, *e converso*. The subject of levies under execution, is expressly provided for by the statute of New York of the 31st of March, 1801; and what effects or estate may be taken in execution depends upon the true construction of the terms of that act. It declares that "all the *lands, tenements, and real estate*" of every debtor shall be liable to be sold upon "execution," etc., for the payment of any judgment against him for debt or damages. What has been the judicial construction of these words in this act, whether they include a right of entry, does not, as far as my researches extend, appear ever to have been decided. It is indeed suggested by Mr. Justice Woodworth, in delivering

* See *Coffin v. Smith*, 2 H. Bl. 444.

† *Matter of Smith*, 16 Johns. Rep. 102.

the opinion of the Court in *Jackson v. Varick*, 7 Cowen's Rep. 238, 244, that the reasonable construction is, that it includes such a right; but the point was not then before the Court, and he does not treat it as a point settled by adjudication. The words to which he refers in another part of the act, giving the form of the execution (sec. 9), in which it is confined to lands and tenements *whereof the debtor was seized* on the day when the same land became liable to the debt (by the judgment), would rather incline one to a different conclusion. And it is certain that under the statute of Westminster 2, ch. 18, subjecting lands to execution, lands of which the debtor is disseized at the time of the judgment cannot be taken in execution.* Be this as it may, it is certain that in New York the process upon executions, and under the absconding debtor act are not co-extensive in their reach. A judgment is not a lien upon a mere equity; and such an equity (not being an equitable estate under the statute of uses of 1787, sec. 4), is not an interest which can be sold on execution. And choses in action do not appear to be within the scope of the act respecting executions; for the language confines it to "*goods and chattels*." Yet choses in action by the express terms of the absconding debtor acts pass under the attachment; and there are various other interests which may well pass under these acts, which yet are not liable to be taken under a common execution. Several cases illustrative of this position, will be found collected in Mr. Johnson's Digest, title Execution 2.*

It appears to me, then, that the true mode, by which we are to ascertain whether a right of entry passes under the absconding debtor acts, is not by any forced analogy to the case of common executions, but by a just interpretation of the terms of the act themselves. The act of 1801 is in substance a revision of the act of 1786; no material distinction between them, applicable to the case before the Court, has been pointed out at the argument; and they may therefore be treated as substantially the same.

The act of 1801 begins (section 1) by providing for cases of absconding and absent debtors, and upon proof thereof, provides that a warrant shall issue to the sheriff commanding him to attach and safely keep "all the estate *real and personal* of such debtor," and make and return a true inventory thereof. Goods, effects, and choses in action, are expressly

* 1 Roll. Abridg. 888, Com. Dig. Execution, c. 14.

declared to be within the reach of the act. It afterwards proceeds to provide for the appointment of trustees, and authorizes them (section 2) "to take into their hands all the *estate* of such debtor, whether attached as aforesaid, or *afterwards discovered by them*, and all books, vouchers, and papers, relating to the same; and the said trustees, from their appointments, *shall be deemed vested with all the estate of such debtor*, and *shall be capable to sue for and recover the same*; and all debts and things in action due or belonging to such debtor, and all the estate attached as aforesaid, shall be by the sheriff, etc., delivered to the said trustees; and the trustees, or any two of them, shall sell at public vendue after fourteen days, previous notice of the time, and place, *all the estate, real and personal of such debtor as shall come to their hands*, and deeds and bills of sale for the same make and execute, which deeds and bills of sale shall be as valid as if made by such debtor," etc. The act afterwards goes on to provide for the distribution of the proceeds of the sales among the creditors, and then declares, that "*the surplus*, if any, after all just debts and legal charges as aforesaid are satisfied, *shall be paid to such debtor or his legal representatives*." There is no provision in the act as to what shall be done in respect to any property which never came to the hands of the trustees, nor of any property remaining unsold by them when all the debts were satisfied; and the omission may easily be accounted for from the general policy of the act; for the language is, that the trustees shall sell *all the estate which comes to their hands*. If the point were material I should strongly incline to the opinion, that the act did not *absolutely* divest all right and title out of the debtor of any of his estate, *which should not come to the hands of the trustees and be sold by them*. But whether this be so or not, I am clearly of opinion that when once all the purposes of the trust are satisfied, and all the debts are paid; if the trustees have any legal interest or title vested in them in the estate of the debtor remaining unsold, it is subject to a *resulting use* for the benefit of the debtor, in the same manner as the surplus of the property sold. Suppose, before the sale, all the debts should be paid, must the trustees go on to sell? Suppose all the debts are paid by a sale merely of the personal estate, is not their trust extinguished? The trustees take all the estate in the first place for the benefit of the creditors, and in the next place, they being paid, for the benefit of the debtor. Subject to the rights of the creditors, the use is in him; and by operation of law the estate reverts in him, as soon as the trust for

the creditors is exhausted or extinguished. This seems to me a reasonable, if not a necessary construction of the act; for it has provided for no express reconveyance by the trustees to the debtor, in any case whatsoever. It certainly could not intend to deprive him of his inheritance after all his debts were paid. And it is but just to give the act a construction favorable to the debtor, when all its other objects are accomplished. In the present case the whole proceedings afford a strong presumption that all the debts of P. R. Randall have been paid; and none are pretended to exist. His right of entry in the demanded premises was never sold by the trustees; and even if it vested in them, it afterwards by operation of law revested in him, if the trusts were all defunct and satisfied. But I go farther, and incline to the opinion that his right of entry in the demanded premises did not pass to the trustees under either of the attachments. The language of the acts of 1786 and 1801 is indeed quite broad, and extends to all the "estate real and personal" of the debtor. But a right of entry is not, as has been already shown, an "estate" in any just and legal sense of the word. Neither is it a "thing in action;" for it does not depend upon any right to sue, but may be enforced by a mere entry. Indeed, a right of action, and a right of entry, are often used in contradistinction to each other.

The case of *Smith, etc., v. Coffin*, 2 H. Bl. 444, turns altogether upon other considerations, and upon the interpretation of the words of the English bankrupt laws. Words of a very broad import are used in those laws; and the policy of them is far more extensive than that which governs the laws of New York, now under construction. A construction might be properly adopted in respect to the bankrupt laws, which would not apply to the absconding debtor acts of New York. The general policy of the common law is to discourage the grant or sale of mere rights of entry and action, with a view to suppress litigation. This policy spreads itself over many important interests; and is so fundamental, that nothing but a very clear expression of the legislative intention ought in my judgment to overthrow it. No such intention is to be found in the acts of 1786 and 1801. Can it be reasonably presumed that the Legislature meant to authorize the sale of a right of entry to a purchaser? If not, was it the intention to enable the trustees to reduce the right into possession, and afterwards to sell the same? I think the former was manifestly not the intention of the Legislature; and I found myself on the very words of the acts. The trustees are to

sell, not all the estate of the debtor, but all the estate real and personal, "*as shall come to their hands*;" that is, as I construe the words, such as they shall reduce into possession; so that the estate may bring its uncontroverted value. But for the reasons already stated, I incline also to the opinion, that it was not the intention of the Legislature to pass the right of entry to the trustees, so that they might be enabled to reduce it into possession.

But supposing it to be otherwise; still it appears to me there is much reason to contend that the trustees, if they took the right of entry at all, took it *sub modo*, and exactly as Paul R. Randall held it. The Legislature did not intend to invest them with a better right than he had. He had a right of entry into the estate vested in him by descent, and he might perfect his estate by an actual entry during his lifetime. But if he died without such entry, then the right to the estate devolved not upon his own heir, but upon the next heir in the line of descent of Robert R. Randall. In this view of the act, the trustees were bound, then, to reduce the right of Paul R. Randall into possession during his lifetime, if they meant to perfect their title thereto. Not having done so, the title devolved upon the next heir who claimed, not through them, but from the ancestor from whom Paul R. Randall took it. This, however, is not the main ground on which I rely, though it fortifies some of the considerations already mentioned. The main ground on which I rely is, that whatever construction of the act may be adopted in other respects, as soon as all the trusts of the assignment are executed, there arises a resulting use to the debtor, which, by operation of law, will re-vest all the unsold estate in him.

Upon the whole, my opinion is, that the proceedings against Paul R. Randall did not pass his right or interest in the lands in question, so as to defeat the demandant in any respect; but if they did, and all the trusts have been satisfied, there is a resulting use to him in the unsold estate.

The next question is, whether, inasmuch as the count in the cause is for the entire right in the premises, the demandant can recover a less quantity than the entirety.

This is a question somewhat involved in technical learning, and therefore requires an accurate examination of the authorities. Reasoning upon general principles and the analogies of the law, there would be little difficulty in deciding it in the affirmative; for it is deciding no

more than that he who has a right, shall recover according to his right, so, always, that he does not recover more than he sues for. No injury is done to the tenant by allowing the demandant who sues for ten acres, and shows a title only to one, to recover for the latter; nor if he sues for an entirety and shows title to a moiety, to recover for the latter. And it is in furtherance of justice that he should so recover; because it prevents multiplicity of suits. For if his suit should abate for this fault (and that is the only judgment which could be pronounced), he would still be entitled to a new action for the part to which he had shown title. The falsity of the former writ would constitute no bar.

Let us see, then, how the case stands upon authority. By the old common law, if the writ of the demandant was falsified by his own *confession* (for it is far from being certain that it was ever true, when found by a *verdict* upon the merits, after the general issue joined),* as to anything or part of a thing demanded in the writ, it abated for the whole. If the matter did not appear on the face of the record, but was to be made out by facts *dehors*, then the tenant, if he meant to avail himself of it, was compelled to do it by a plea in abatement. Thus if he meant to avail himself of non-tenure of the whole, or a part, he must plead it. But where, upon the whole record, the falsity of the writ was apparent by confession of the party, there, although the tenant had not pleaded in abatement, it was the duty of the Court, *ex officio*, to abate the writ.

Now, at the common law, there are two sorts of writs in real actions. In one the demand is in a general form, without specification of any lands in particular. Thus in the writ of *assize*, the demand is that the tenant "unjustly and without judgment hath disseized him of *his freehold in C.*," † without any further description of the land. So in writs of dower, the demand is of the demandant's "reasonable dower, which falleth to her of *the freehold*, which was of A. her late husband in C., whereof she hath nothing," ‡ without more. The plaint or count is less general, and specifies the particulars of the demand, as a message, ten acres of land, etc. § In the other sort of writs, the writ itself is as

* See Plowden 424, 6. Hobart's Rep. 282, 6. Fitz. Abridg. Breve 272. 9 Hen. 6, 54. 11 Co. 45. Theol. Dig. Lib. 16, ch. 5.

† Booth on Real Actions 210. Fitz. N. B. 177.

‡ 2 Saund. Rep. 43. Booth on Real Actions 166. Fitz. N. B. 147.

§ Com. Dig. Assize, B. 11. Booth on Real Actions 212, and note.

special as the count. Such is the case of all *precipes quod reddat*, such as writs of right, and writs of entry, etc., where the demand is of a certain messuage, or ten acres of land, etc., etc., and the exigency of the writ is that the said tenant should render the same to the demandant without delay.* Now, it was upon this difference that a distinction took place in the common law as to the right of the demandant to abridge his demand. If the writ was special, he could not abridge his demand in any case. If the writ was *general, de libero tenemento*, he might abridge his demand at his pleasure, so always that he did not abridge it of a moiety or portion, where he sued for the *entirety* of a thing; as if he sued for ten acres he might abridge it to five; but if he sued for the whole of a messuage, he could not abridge it to a moiety. This doctrine will be found at large in many cases; but it is nowhere better expounded than in the opinion of Mr. Justice Juyn (afterwards chief-justice), in 14 Hen. 6, p. 3, 4. He said, "that in all cases where the writ is *de libero tenemento* generally, as in assize and writs of dower, where the writ is of her reasonable dower, etc., the demandant may abridge his plaint or demand; and the reason is because although he abridges some acres, yet the writ remains true as to the rest, it being *liberum tenementum* still. But where a certain number of acres is demanded in the writ, as in a formedon, the demandant cannot abridge, for he acknowledges his writ false; and where a writ is acknowledged to be false in part, it must abate it in the whole; but if in an assize the writ be, he unjustly disseized him *de libero tenemento* in A. and B., and he would abridge his demand as to all in B. he shall not abridge; for his writ is false, which supposes him disseized of the tenement in A. and B." As to this last position there is some difference in the authorities; but the general position is unquestionable law.† But this doctrine even in relation to assizes was of little value to the demandant in many cases, because it stopped short of the most common sources of mistake. If, therefore, he counted against one as tenant of the *whole*, and he pleaded non-tenure as to part, or joint tenancy, etc., and it appeared by confession or otherwise, that the plea was true, the writ abated

* Fitz. N. B. 1, 5, 191. Booth Real Actions 1, 83, 88, 91, 172.

† See Com. Dig. Abridg. A. 2 Saund. Rep. 44, and note 4. Gilb. Com. Pl. 199, 201, 202, 203. Brooks, tit. Abridg. 14 Hen. 6, p. 4. 9 Hen. 6, p. 42. 3 Lev. 68. Vin. tit. Abridg. Theol. Dig. Lib. 16, ch. 2. Bac. Abridg. Abatement, L.

as to the whole, for the falsity of the writ was established in this, that the tenant was sued as the tenant of the *whole*, and was tenant only of *part*. This mischief was cured by the statute 25 Edw. 3, ch. 16, which provided, "that by the exception of non-tenure of parcel, no writ shall be abated but for the quantity of the non-tenure, which is alleged."* Still, however, many difficulties remained behind; for if a party sued for an entirety, as of a manor, or a messuage, or one acre, and a bar was pleaded as to a moiety, or part of the land put in view, etc., in the plaint, the defendant could not abridge his plaint to the moiety left, since his writ was for an entirety, and so far false: the distinction was nice, for he might abridge his plaint from two or ten acres to one acre; but not as to the extent of his title or right in the land put in view. Such, however, as the distinction was, (and it suited the subtilty of the times,) it prevailed until the statute of 21 Hen. 8, ch. 3, which provided, that in assizes the demandant might in all such cases abridge his plaint, and proceed for the residue.† But this statute is confined to assizes; and, therefore, left the common law in full force as to all other real actions.

Such is a brief review of the doctrine at common law in respect to the abridgment of plaints by the demandant. It is not, however, to be imagined that the old authorities are all in harmony on this subject. On the contrary, diversities of opinion seem to have existed from an early period. In Godfrey's case, 11 Co. 42, 45, the Court proceeded mainly on the rule already stated. Lord Coke, however, thought that the common and true rule and difference is where a man brings an action, be the suit general or certain and particular, and he demands two things, and it appears of his own showing that he cannot have an action or better writ for one of them, there the writ shall not abate for the whole, but shall stand for that which is good. But when a man brings an action for two things, and it appears that he cannot have this writ for one thing, but may have another in another form, there the writ shall abate for all, and shall not stand for that which is good. The distinction has sound sense in it; but it is inapplicable to the present case;

* See Gilb. Hist. C. P. 201.

† See Com. Dig. Abridgment, B. Viner, tit. Abridgment. Theol. Dig. Lib. 8, ch. 28. Id. Lib. 16, ch. 2. Keilway 116, pl. 56. 5 Hen. 7. 19 Hen. 6, 13. Brooks, Abridgment, pl. 2.

because here, the plaintiff has not shown upon the pleadings, that he has no title to maintain his writ for the whole.*

Writs of *precipe quod reddat* then, except so far as the statute 25 Edw. 3, of non-tenure aided them, stood upon the footing of the common law. In respect to them, therefore, the demandant could not abridge his claim except in cases of non-tenure; and if his writ could not by his own confession be maintained for the whole for which he sued, his writ abated for the whole; and it was not material whether he sued for the entirety of a certain number of acres, and showed title to a less number; or whether he sued for the whole or a moiety, and showed title only to a less aliquot part.† But unless the falsity of his writ appeared by his own confession, even though it appeared by the verdict, the better opinion was that the writ was not abated for the whole. Plowden, indeed, in *Bracebridge v. Cook*, Plowden 424, thought the objection fatal. But Lord Hobart, in *Clanrickard v. Sidney*, Hob. 272, 282, condemned that opinion as erroneous, and against common experience in his day. And in this last case it was further held that the variance was but matter of form, and at all events cured by the statute of jeofails of 18 Elizabeth, ch. 14, after a verdict, even though it appeared by *confession* of the party, upon the pleadings. In that case the writ was formed on for an entirety; and upon the demandant's own confession it appeared that he was entitled to recover but two-thirds. But the Court held, that the parties having gone to trial upon an issue, and the jury having found a special verdict in favor of the plaintiff for the two-thirds, his suit was not abatable for the whole, but the error was cured by the statute of jeofails of 18 Elizabeth, ch. 14.‡ Whoever will read Lord Hobart's learned opinion upon that occasion will perceive the most solid reasons brought in support of it. The doctrine that if a demandant sue for an entirety, he may yet after verdict recover for a

* See 1 Saund. R. 282, 285, note 7. Com. Dig. Abatement, M. N. Cro. Jac. 104. Theol. Dig. B. 8, ch. 28, sec. 13. 9 Hen. 7, 4 (b).

† See Com. Dig. Abatement, L. 1, 2. M. Saville's R. 86. *Clanrickard v. Sidney*, Hob. 273, 274, 279, 282. Com. Dig. Abridgment, B. *Chatham v. Sleigh*, 3 Lev. 67. Viner, tit. Abridgment. Fitzherbert's Abridgment, tit. Breve, 272. Plowden, 424.

‡ See Bacon's Abridgment, Amendment, B. Theol. Dig. Lib. 16, s. 15, 18. 2 Roll. Ab. 719, pl. 19. *Cooper v. Frankling*, 1 Roll. R. 384. S. C. 3 Bulst. R. 148.

moiety, is not only supported by the case in Hobart's Rep. 172, but by the case *Cooper v. Frankling*, 1 Roll. Rep. 384. S. C. 3 Bulst. 148, and 2 Roll. Ab. Trial, p. 719, pl. 12. The doctrine, that if he sue for a moiety he may recover for a less aliquot part, may be deduced from the same causes, for it stands upon the same reasoning as that applicable to entireties. So was the reasoning in Saville's Rep. 48, pl. 165.* There are many cases in ejectment where the same doctrine has been maintained, and in none of them has any distinction been asserted between an ejectment and real actions. The ground of argument has been the variance between the count and verdict; so that it has turned upon the falsity of the plaintiff's claim and title as propounded in his writ and proved at the trial. So was the case of *Ablett v. Skinner*, 1 Sid. 229, where the ejectment was for *one-fourth* part of a *fifth* part; and the plaintiff's title upon the trial was but *one-third* part of a *fourth* of a *fifth* part; and yet it was held that he was entitled to recover according to his title. That case was recognized and fully confirmed in the case of *Denn d. Burges v. Purvis*, 1 Burr. Rep. 326; where in ejectment the plaintiff sued for a *moiety* and recovered a *third*. Lord Mansfield relied on the analogous doctrine in cases of assize.

It may then be assumed as certain, that from the time of Lord Hobart the general doctrine has been, that the demandant in any real action is entitled to recover less than he demands in his suit, whether he demands an entirety or an aliquot part, if the variance is not taken advantage of until after a verdict found on trial had. If, indeed, the matter is pleaded in abatement, it is fatal to the whole suit. So if it appears of record by the *confession* of the demandant in the course of the pleadings, the writ is abatable for the whole, if the tenant choose to take advantage of it before verdict. But if the parties go to trial upon the merits, and a verdict, general or special, is found of any part for the demandant, there the variance between the writ and the title, even though by the *confession* of the demandant upon the pleadings, is cured by the statute of amendments of 18 Elizabeth, ch. 14. This, then, being the state of the law at the time of the emigration of our ancestors, and the statute of Elizabeth being a remedial and not a penal law, and the general principle being that statutes made in amendment of the law before that period constitute a part of our common law; the Court might, if it were neces-

* See Scot and Scot's case, 4 Leon. R. 39. Com. Dig. Abatement, M.

sary, resort to this principle to support the present suit. But such a resort is not necessary ; because, in the first place, the present case is not one where the defect appears upon the *confession* of the party ; but if at all, appears from facts proved at the trial upon the general issue. In the next place, the provisions of the judiciary act of 1789, ch. 20, sec. 32, upon the subject of amendments and jeofails, are far more extensive than the English statutes, and would justify the most comprehensive construction in favor of the demandant. And in the last place, the original nicety of the common law doctrine upon this subject, at least since the time of Lord Hobart, seems to have given way (where the matter was not pleaded in abatement) to the doctrine of common sense. As far as we can trace it, it has been long established in England. Its existence in America has never been maintained by any positive decision in its favor. On the contrary, in Massachusetts, where real actions constitute the ordinary remedy for disseizins and ousters, it has been solemnly adjudged, upon a careful consideration of the English authorities, that the demandant may in all cases recover less than he sues for, whether he sues for an entirety or an aliquot part. So are the cases of *Dewy v. Brown*, 2 Pick. Rep. 387 ; and *Somes v. Skinner*, 3 Pick. Rep. 52 ; and the opinion of very able commentators upon this branch of the law.* There is nothing in the case of *Green v. Lister*, 8 Cranch 229, 242, which trenches upon this doctrine. So far, indeed, as that case goes, it is favorable to the demandant.

I have not thought it necessary to go into a particular examination of the point, whether, if the variance between the demandant's title and his demand in his writ be apparent only by the finding of the jury upon the general issue, and not by the pleadings of the parties, or the confession of the demandant, the writ was abatable for the whole, upon the old doctrine of the common law. There is much reason to believe, as has been already intimated, that under such circumstances the variance was never fatal to a recovery *pro tanto* ; and the modern doctrine in England is certainly in favor of a recovery. But whether it be so or not, independent of the statute of jeofails, that statute certainly cures the defect upon the principles already stated.

Upon the whole my opinion is, that this question ought to be certified in favor of the demandant.

* Jackson on Real Actions 296. Stearns on Real Actions 204.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the southern district of New York, and on the questions and points on which the judges of the said Circuit Court were opposed in opinion, and which were certified to this Court for its opinion, in pursuance of the act of Congress for that purpose made and provided, and was argued by counsel; on consideration whereof, it is the opinion of this Court:

I. That although the count in the cause is for the entire right in the premises, the demandant may recover a less quantity than the entirety.

II. And under the second general point, the following answers are given to the specific questions:

1. If John Inglis, the demandant, was born before the 4th of July, 1776, he is an alien, and disabled from taking real estate by inheritance.

2. If he was born after the 4th of July, 1776, and before the 15th of September of the same year, when the British took possession of New York, he would not be under the like disability.

3. If he was born after the British took possession of New York, and before the evacuation on the 25th of November, 1783, he would be under the like disability.

4. If the grand assize shall find, that Charles Inglis the father, and John Inglis the demandant, did, in point of fact, elect to become and continue British subjects, and not American citizens, the demandant is an alien, and disabled from taking real estate by inheritance.

III. The will of Catherine Brewerton was sufficient to pass her right and interest in the premises in question, so as to defeat the demandant's right to recover, so far as her right or interest extended.

IV. The proceedings against Paul Richard Randall, as an absent debtor, passed his right or interest in the lands in question to, and vested the same in the trustees appointed under the said proceedings, so as to defeat the demandant's right to recover so far as his right or interest extended; unless the grand assize shall find, that the trusts vested in the trustees have been performed; and if so, the said proceedings will not defeat the demandant in any respect.

V. The devise in the will of Robert Richard Randall of the lands in question is a valid devise, so as to divest the heir at law of his legal estate.

Whereupon it is ordered and adjudged by this Court to be certified

to the judges of the said Circuit Court of the United States for the southern district of New York :

I. That although the count in the cause is for the entire right in the premises, the demandant may recover a less quantity than the entirety.

II. And under the second general point, the following answers are given to the specific questions :

1. If John Inglis, the demandant, was born before the 4th of July, 1776, he is an alien, and disabled from taking real estate by inheritance.

2. If he was born after the 4th of July, 1776, and before the 15th of September of the same year, when the British took possession of New York, he would not be under the like disability.

3. If he was born after the British took possession of New York, and before the evacuation on the 25th of November, 1783, he would be under the like disability.

4. If the grand assize shall find, that Charles Inglis the father, and John Inglis the demandant, did, in point of fact, elect to become and continue British subjects, and not American citizens, the demandant is an alien, and disabled from taking real estate by inheritance.

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V. The devise in the will of Robert Richard Randall of the lands in question, is a valid devise, so as to divest the heir at law of his legal estate.

All of which is accordingly hereby certified to the said Circuit Court.

Mr. Webster, on a subsequent day of the term, submitted to the Court an application in behalf of the demandant, for a re-argument of this case. He presented, as the ground of the application, a statement in writing signed by the counsel in the case, *Mr. Ogden* and himself, representing " that the question in this cause, which arises on the construc-

tion of the will of Robert Richard Randall, is one, not only of great importance, but certainly of no small difficulty. The case was argued at a time when there were six judges on the bench. At the time of the decision there were but five judges living who had heard the cause; of these five, three were against the demandant upon the construction of the will, being a minority of the whole Court. Under these circumstances, as counsel for the demandant, in a foreign country, the counsel feel it their duty to ask for a re-argument; the more particularly, as it appears from an affidavit now submitted to the Court, that a sister of the demandant, who is now and long has been a feme covert, in case of a decision, upon the construction of the will, in favor of the demandant, is not subject to the disability of alienism, and may therefore maintain a suit to recover the property in dispute."

Mr. Wirt objected to the re-argument, alleging, that should it be allowed, it would establish a precedent which would render every decision of the Court uncertain; and encumber the Court with heavier duties than it could perform. It was without example in the whole course of the Court since its organization.

Mr. Chief-Justice MARSHALL delivered the opinion of the Court.

The Court have considered the application for a re-argument in this case. It must be a very strong case, indeed, to induce them to order a re-argument in any of the causes which have been once argued and decided in this Court. The present case has been very fully considered, and the Court cannot perceive any ground in the present application, to induce them to consent to the motion. It is therefore overruled.

"Alien, alienigena, is derived from the Latin word *alienus*, and according to the etymology of the word it signifieth one born in a strange country, under the obedience of a strange prince or country (and therefore Bracton saith that the exception *propter defectum nationis* should rather be *propter defectum subjectionis*), or as Littleton saith (which is the surest), 'out of ligeance of the king.' Note, Littleton saith not *out of the realm*, but *out of the ligeance*; for he may be born out of the realm of England, yet within the ligeance," Co. Lit. 128 b, 129 a. *Prima facie*, a person born out of the territorial limits of a country is an alien, as to such country and to rights under its laws, but the circumstances of his birth may be such that he will

be in the eye of the law a native, as, at common law, the children of ambassadors residing abroad, *Calvin's Case*, 7 Co. 18 a; *Inglis v. Trustees of Sailor's Snug Harbor*, 3 Pet. 99; or born on a vessel of the country upon the high seas, *Id.*; while on the other hand a person born within the realm, of parents who were alien enemies, would be held an alien, *Calvin's Case*, *supra*.

American Rule of Citizenship as Declared by the Revised Statutes.

The American rule of citizenship is thus laid down in the Revised Statutes of the United States, and all persons not coming within the provisions thereof are born aliens.

Section 1992. All persons born in the United States, and not subject to any foreign power, excluding Indians not taxed, are declared to be citizens of the United States.

Section 1993. All children heretofore born, or hereafter born, out of the limits and jurisdiction of the United States, whose fathers were, or may be at the time of their birth, citizens thereof, are declared to be citizens of the United States; but the right of citizenship shall not descend to children whose fathers never resided in the United States.

Section 1994. Any woman who is now, or may hereafter be, married to a citizen of the United States, and who might herself be lawfully naturalized, shall be deemed a citizen.

Section 1995. All persons born in the district of country formerly known as the Territory of Oregon, and subject to the jurisdiction of the United States, on the 18th May, 1872, are citizens in the same manner as if born elsewhere in the United States.

The Constitution of the United States, Art. IV., Sec. 2, provides that "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." Under this clause, the citizen of any State is to be regarded, for the purpose of holding, enjoying, devising, or inheriting real estate situated in any other, as a native thereof.

Naturalization—Right of Expatriation.

Naturalization is also provided for, R. S. 2165–2174. Under our law, a person born within the allegiance of the United States may expatriate himself and become an alien. The law was not, however, so settled for a long time, and the right of expatriation was long questioned. It was recognized in the first Constitution of Pennsylvania, in that of Vermont, and in that of Virginia, and was early supported upon abstract principles by Professor

Tucker, *Tucker's Blacks*. App., note K.; but Chancellor KENT, 2 Kent Com. 44 *et seq.*, declares, after a review of the authorities, that in his time the English rule (*nemo potest exuere patriam*) remained the doctrine of the American law; and according to PATTERSON, J., in *Talbot v. Janson*, 3 Dall. 133, even where expatriation was permitted by the legislation of the State, the citizen could not, by emigration or otherwise, in pursuance of such authority, cast off his allegiance due to the United States. The Supreme Court of Kentucky did, indeed, as late as 1839, hold that the right of expatriation was a fundamental American doctrine, and that if no statute upon the subject existed, and a citizen in good faith abjured his country, her assent to his denationalization would be presumed, *Alsberry v. Hawkins*, 9 Dana 178. The current of authority, however, tended to support the position of Kent. At the same time, the inconsistency of our position, which denied to our own citizens the right of expatriation, and at the same time claimed the right to naturalize aliens, and made their renunciation of their former allegiance, without any evidence of assent thereto on the part of their sovereigns, a prerequisite to naturalization, was very apparent, and the remedy was applied by Congress, by the Act of July 27, 1868, recognizing the right of expatriation. The act is as follows:

"Whereas, the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness; and, whereas, in the recognition of this principle this government has freely received emigrants from all nations and invested them with the rights of citizenship; and, whereas, it is claimed that such American citizens, with their descendants, are subjects of foreign States, owing allegiance to the governments thereof; and, whereas, it is necessary to the maintenance of public peace that this claim of foreign allegiance should be promptly and finally disavowed; therefore, any declaration, instruction, opinion, order, or decision of any officer of the United States, which denies, restricts, impairs, or questions the right of expatriation, is declared inconsistent with the fundamental principles of the republic."

Expatriation, how Accomplished.

The mere removal from the country, followed by a long residence abroad, will not be sufficient to raise the inference of expatriation, the intent to exercise the right must be shown by some act. Thus, where a man went to South America for the purposes of trade, to remain indefinitely, and married an alien in the foreign country, but took no further steps showing an intention to transfer his allegiance, it was held that he had not lost his citizenship, and that a child born to him, while abroad, was an American citizen, *Lud-*

lam v. Ludlam, 26 N. Y. 356; and in Kentucky, where the right of expatriation has always been fully recognized, it was held that where a married woman, who had been taken out of the country by her husband, returned to the State shortly after his death and remained there, there was proof of her intent to retain her citizenship, and that she was entitled to her property rights as a citizen, *Moore v. Tisdale*, 5 B. Mon. 352; and see *Murray v. Fishback*, 5 B. Mon. 403.

Effect of Annexation of Territory.

The annexation of territory has the effect of rendering all the inhabitants thereof, who remain therein after the annexation, citizens of the annexing country, *State v. Primrose*, 3 Ala. 546; *Harrold's Case*, 1 Clark (Pa.) 214; but an alien who removed to the territory of Orleans after 1803, the date of the treaty of Paris, and prior to the admission of Louisiana as a State, did not become by such removal or admission a citizen, *State v. Primrose, supra*. By the Declaration of Independence, inhabitants of the other parts of the British empire became, as to the United States, alien enemies, *Commonwealth v. Bristow*, 6 Call 60.

A question of considerable interest with reference to alienage arose early in the history of this country; namely, in what position, with respect to their allegiance, were people, born before the Declaration of Independence, placed by the adoption thereof? The British government was overthrown by a revolution, new sovereignties rose from the colonies. These sovereignties claimed to have succeeded to the rights of the British crown. Was then every person born within the boundaries of a State to be considered a native, notwithstanding his disaffection to the State and his preference for the allegiance under which he was born? Should he be allowed an election? or should his status be fixed by his geographical position either at the time of the Declaration or at the time of the treaty of peace and recognition with the mother country?

These questions were considered in *Ainslie v. Martin*, 9 Mass. 454, and the ground was taken that all persons born within the province of Massachusetts Bay before the Declaration of Independence were born within the allegiance of the State, by relation, as successor to the rights of the crown. PARSONS, C. J., said: "By this [the common law], to make a man an alien, he must be born without the allegiance of the commonwealth. . . . But it is said that by this common law definition, the demandant is an alien because he was born before the Declaration of Independence. To this it is answered that, then, all the inhabitants born within the territory of the late province of Massachusetts Bay, and who were born before the

Declaration of Independence, are also aliens. . . . This people, in union with the people of the other colonies, considered the several aggressions of their sovereign, on their essential rights, as amounting to an abdication of his sovereignty. The throne was then vacant, but the people, in their political character, did not look after another family to reign; nor did they establish a new dynasty, but assumed to themselves, as a nation, the sovereign power with all its rights, privileges, and prerogatives. Thus this government became a republic, possessing all the rights vested in the former sovereign, amongst which was the right to the allegiance of all persons born within the territory of the province of Massachusetts Bay. . . . It was therefore considered as the law of the land, that all persons born within the territory of this government and people, although before the Declaration of Independence, were born within the allegiance of the same government and people as the successors of the former sovereign, who had abdicated his throne." This case was followed in *Martin v. Woods*, 9 Mass. 377.

The doctrine above enunciated was not, however, generally followed, and the rule was soon established that where a person was born in this country before the Declaration of Independence, he had, after that event, the right to elect to which government he would adhere. In *Inglis v. Trustees of Sailor's Snug Harbor*, 3 Pet. 99, STORY, J., said: "Two things usually concur to create citizenship; first, birth locally within the dominions of the sovereign, and, secondly, birth within the protection and obedience; or, in other words, within the ligeance of the sovereign. That is, the party must be born within a place where the sovereign is at the time in full possession and exercise of his power; and the party must also at his birth derive protection from, and, consequently, owe obedience or allegiance to, the sovereign *de facto*." And with respect to the question immediately under consideration, he said: "Perhaps the clearest analogy to govern such cases is to bring them within the rule that applies to cases of conquest where those only are bound to obedience and allegiance who remain under the protection of the conqueror." In commenting upon *Ainslie v. Martin*, the learned judge denied that it was of authority even in its own State. In *Inglis v. Trustees of Sailor's Snug Harbor*, *supra*, the Supreme Court laid down the following rules for determining the citizenship or alienage of the demandant, viz.:

1. If the demandant was born before July 4, 1776, he was born a British subject; and if he remained within the British lines, and manifested no election to become an American citizen, he must be considered an alien.

2. If born in New York after July 4, 1776, and before the British took possession of that city, his infancy incapacitated him to make an election,

and his father's election determined his status, subject to his right to change it on attaining his majority.

3. If born in New York during the British possession, he would be a British subject, unless his election to become an American citizen were shown; and that even though the Legislature of New York had passed an act during the time of such possession, that the allegiance of all within her territorial boundaries was due to her, and had attained the father of treason, the attainder operating to release the allegiance. This case, it will be seen, recognized and maintained the right of election in the fullest manner. See also *Orser v. Hoag*, 3 Hill 79; *Jackson v. White*, 20 Johns. 313; *Shanks v. Dupont*, 3 Pet. 242; 1 Harp. Eq. 5; *Palmer v. Downer*, 2 Mass. 179, note; *Kilham v. Ward*, Id. 236; *Inhabitants of Manchester v. Inhabitants of Boston*, 16 Id. 230; *Trimbles v. Harrison*, 1 B. Mon. 140; *Moore v. Wilson's Admr.*, 10 Yeager 406.

This election need not have been made in express words, or by any formal act, but might have been inferred from actions; thus a citizen who left the country during the Revolution, and remained away until his death, was held to be an alien, *Palmer v. Downer*, *supra*; a lady who during the war married a British officer and went with him to England, where she remained until her death, in 1801, was held an alien, *Shanks v. Dupont*, *supra*; an American who left the country before the Revolution and did not return until 1797, *Inhabitants of Manchester v. Inhabitants of Boston*, *supra*, and one who had joined the British forces during the war and did not return until after the peace, *Orser v. Hoag*, *supra*, were held aliens. But any one who remained in this country after the peace of 1783 was presumptively a citizen, *Trimbles v. Harrison*, *supra*; and one who left the United States during the Revolution, but returned thereto before the peace, was held a citizen, *Kilham v. Ward*, *supra*; and the doctrine of election was even extended so far as to allow a deserter from the British forces, or a prisoner of war, voluntarily remaining within the American lines, if he continued there until the peace, to be considered a citizen, *Inhabitants of Cummington v. Inhabitants of Springfield*, 2 Pick. 394; *Hebron v. Colchester*, 5 Day 169. In *Moore v. Wilson's Administrator*, *supra*, it was held that residence prior to the close of the Revolution was prima facie evidence of citizenship, and that in such case adherence to the British government and not foreign birth was the test of alienage; but in *Jackson ex d. Folliard v. Wright*, 4 Johns. 75, an alien who emigrated to the United States in 1779, and there remained until his death, in 1798, was held to remain an alien.

The doctrine of election has also been recognized by our courts in connection with the secession of Texas from Mexico, *Jones v. McMasters*, 20 How. 8; *McKinney v. Saviego*, 18 Id. 235; and also in connection with the

cession of that part of Mexico which was annexed to the United States at the conclusion of the Mexican war, *Quintaine v. Tomkins*, 1 New Mex. 29; *Carter v. Territory of New Mexico*, Id. 317.

As to Rights in Realty, no Distinction between Alien Friend and Enemy.

As to the rights and disabilities of aliens, it is to be premised that, in respect to rights to the acquisition, possession, and enjoyment of real property, there is no distinction made by the law between an alien friend and an alien enemy, *Marshall v. Conrad*, 5 Call 364; *Yeo v. Mercereau*, 3 Harrison (N. J.) 387; *Fairfax's Heir v. Hunter's Lessee*, 7 Cr. 609; *Stephen's Heir v. Swann*, 9 Leigh 404; the alien's disability resting upon his alienage and not upon his inimical character, *Read v. Read*, 5 Call 207.

Alien may take by Purchase, but cannot Hold as against the State.

The rule of the common law is that an alien may take land by purchase, but he cannot hold it as against the State. He may, however, hold it until the State manifests her intention to enforce the forfeiture by an office found, *Clifton v. Executors of Haig*, 4 Desau. 330; *Groves v. Gordon*, 3 Brev. 245; *Doe ex d. Gouverneur's Heirs v. Robertson et al.*, 11 Wheat. 332; *Smith v. Zaner*, 4 Ala. 99; *Montgomery v. Dorion*, 7 N. H. 475; *Sheaffe v. O'Neil*, 1 Mass. 256; *Fairfax's Devisees v. Hunter's Lessee*, 7 Cr. 603; *Craig v. Radford*, 3 Wheat. 594; *Craig v. Leslie*, Id. 589; *Laurens v. Jenney*, 1 Spears 356; *Dudley v. Grayson*, 6 T. B. Mon. 269; *Wadsworth v. Wadsworth*, 12 N. Y. 376, 16 Barb. 601; *Den ex d. Blount v. Horniblea*, 2 Hayw. 36; *Jenkins v. Noel*, 3 Stew. (Ala.) 60; *Ramires v. Kent*, 2 Cal. 558; *People v. Folsom*, 5 Id. 373; *Buchanan v. Deshon*, 1 H. & G. 280; *Merle v. Mathews*, 26 Cal. 455; *Waugh v. Riley*, 8 Met. 290; *Kottman v. Ayer*, 1 Strobbh. 552; *Phillips v. Moore*, 10 Otto 208; *Scanlan v. Wright*, 13 Pick. 523; *Den ex d. Trustees of University v. Miller*, 3 Dev. 188.

A devise is a purchase within the meaning of rule stated above, *Cross v. De Valle*, 1 Wall. 5; *Vaux v. Nesbit*, 1 McCord Ch. 352; *Marshall v. Conrad*, 5 Call 364; *Fox v. Southack*, 12 Mass. 143; *Guyer et al. v. Smith et al.*, 22 Md. 239.

It is true there are some cases in which the Court is reported to have held that an alien cannot take by virtue of a devise, *Trustees of University v. ———*, 2 Hayw. 104; *Gilmore v. Kay*, Id. 108; but these cases, if correctly reported, seem to be overruled by *Miller v. Harwell*, 3 Murph. 194, in which TAYLOR, C. J., delivering the opinion of the Court, said: "I

believe the law to be well settled that an alien may take by devise, although there be some cases and dicta to the contrary."

To divest the estate of an alien, acquired by purchase, an office found, or an equivalent proceeding on the part of the State, is absolutely necessary, *Jackson ex d. Smith v. Adams*, 7 Wend. 367; *Elmondorff v. Carmichael*, 3 Lit. 472; as the act of conveyance to an alien is regarded as a cause of forfeiture, though the term escheat is sometimes rather loosely used in this connection, and it would be against all the precedent and principle of our law to forfeit an estate without a judicial proceeding of some sort, *McCaw v. Galbraith*, 7 Rich. 74. An act of confiscation, naming the alien enemy whose land is to be confiscated, is equivalent to an office found, *Den ex d. Bayard et ux. v. Singleton*, 1 Mart. (N. C.) 48; and so is the issue by the State of an escheat patent for the land, *Guyer et al. v. Smith et al.*, 22 Md. 239.

Title of Alien not Subject to Collateral Attack.

The title of an alien cannot be attacked for alienage in a collateral proceeding, *Ramires v. Kent*, 2 Cal. 558; *Norris v. Hoyt*, 18 Id. 217; or by any person except the State, *Racouillat v. Sansevain*, 32 Cal. 376; thus it is held that while an alien, who has not declared his intention of becoming a citizen, cannot hold a mining claim against one who connects himself with the government title by compliance with the mining laws, *Golden Fleece Co. v. Cable Consolidated Company*, 12 Nev. 312, yet he will be protected in his possession against trespassers who do not show a connection with the government title, *Courtney v. Turner*, Id. 345.

Alien not accountable for Profits derived before Office Found.

After an office found, an alien cannot be held to account for the profits and rents derived by him out of the land before its forfeiture, *Craig v. Leslie*, 3 Wheat. 589.

Enforcement of Forfeiture a Sovereign Act, and not Exercisable by a Territory.

The right to enforce a forfeiture is an inherent property of sovereignty, and it cannot be exercised by a territory unless conferred upon it by the law organizing it. In *Territory of Montana v. Lee*, 2 Mont. 124, the territory undertook to carry into effect an act forfeiting to the territory mining lands held by aliens; it was held by the Court that the act, not being authorized by the organic law, was void.

An information to forfeit land held by an alien, may be interposed by the State against a claim by an alien plaintiff seeking to recover land, *Reid v. The State ex rel. Thompson*, 74 Ind. 252.

Alien may convey before Office Found.

Before office found, an alien may convey lands, acquired by him by purchase, and if the conveyance be to one capable of taking and holding, his title will be good and valid, *Marshall v. Conrad*, 5 Call 364; *Jenkins v. Noel*, 3 Stew. (Ala.) 60; *Sheaffe v. O'Neil*, 1 Mass. 256; *Montgomery v. Dorion*, 7 N. H. 475; *Foxwell v. Craddock*, 1 Pat. & H. 250; *Halstead v. Board of Commissioners of Lake County*, 56 Ind. 363.

Some authorities, however, have held that the estate so conveyed will still be liable to forfeiture by the State, in the hands of the grantee, *Scanlan v. Wright*, 13 Pick. 523; *People v. Conklin*, 2 Hill 67. These cases are, however, against the current authority, and the position taken in them seems to be against reason. The ground on which the disability of aliens to hold lands rests, is that it is against public policy to allow persons owing no allegiance to the government to own lands within its jurisdiction and protection, and to drain from its territory its resources, perhaps to be employed in acts of hostility to the protecting power, and at any rate to transfer to foreign hands that influence which always accompanies the ownership of the soil. It is for this reason that the law ordains that land held by an alien is forfeitable to the State, and not because the State seeks, by forfeiture, to increase its revenues. If then the State sees fit to abstain from enforcing its plain right, while the land is held by an alien, and the reason for its enforcement exists, it would be contrary to all sound policy and justice that, after the alien has reaped the fruits of the sale of the land, and the land itself has passed to a citizen, the government should then step in and divest the title of one owing allegiance to it, because he had received the land by a conveyance from an alien.

Action by Alien before Office Found.

As to the ability of an alien before office found to maintain an action to recover realty, there has been some difference of opinion. In *Laurens v. Jenney*, 1 Spears 356, the Court seemed to think that the current of authority was against the right, saying: "But if he were out of possession, it would seem he can maintain no action to recover it. This results from his incapacity to maintain any real or mixed action, and not from any incapacity to hold the land until the State shall see fit to determine his title

by the process of escheat." See also *Waugh v. Riley*, 8 Met. (Mass.) 290. But the juster and more reasonable view seems to be that stated by SAVAGE, C. J., in *Bradstreet v. The Supervisors of the County of Oneida*, 13 Wend. 546, the learned judge said: "The case of *McCreery's Lessee v. Allender*, 4 Har. & McH. 409-412, seems to have been decided entirely on common law principles in the Court of Appeals of Maryland; there CHASE, C. J., says that the title of an alien friend is good against everybody but the State, and that this right of possession could not be divested but by office found, or some act done by the State to acquire possession, and judgment was given for the plaintiff, who was an alien and a British subject. . . . If an alien may take and hold real estate against every person, he may do so because he has a right in the property which the laws guarantee to him. It is his as against other individuals; if they attempt to turn him out, or disturb his possession, he may defend himself by virtue of the estate which he has. But suppose some person, by force or fraud, obtains possession, if the plea of alien friend is a bar, the intruder may enjoy the fruits of his improper conduct with impunity. The law cannot be so unjust. The judgment given by Chief-Justice CHASE seems to be the legitimate conclusion from the premises conceded in all the cases and in all the books. If it is the property of the alien against everybody but the government, he has the right to the use of it, and, if necessary, to prosecute for it; surely the right to prosecute is necessarily consequent upon his right to its enjoyment." And see *McCreery's Lessee v. Allender*, 4 H. & McH. 409; *Norris v. Hoyt*, 18 Cal. 217; *Airhart v. Massieu*, 8 Otto 491; *Sabriego v. White*, 30 Texas 576; *Apthorp v. Backus*, Kirby 407.

Defence before Office Found.

Even where it has been held that an alien could not maintain his action, it conceded that where he was in possession, he might defend against one attacking his title. Thus in *Fairfax's Devisee v. Hunter's Lessee*, 7 Cr. 620, STORY, J., said: "It seems, indeed, to have been held that an alien cannot maintain a real action for the recovery of lands, Co. Lit. 129; Thel. Dig., Ch. 6, Dyer 26; but it does not follow that he may not defend in a real action his title against all persons but the sovereign." And see also *Waugh v. Riley*, *supra*, where WILDE, J., recognizes the force of the reasoning in *Bradstreet's Case*, *supra*.

Title acquired as against the State in Massachusetts.

In Massachusetts, an alien, by long continued and undisturbed possession, may acquire a title which will be good against the State, *Piper v. Richardson*, 9 Met. 155.

Alien cannot Plead his own Alienage in Bar of Specific Performance.

An alien will not be permitted to raise his own alienage in bar of a decree of specific performance of a contract relating to realty, *Scott v. Thorpe*, 1 Edw. Ch. 512.

Alien cannot acquire Title by mere Operation of Law.

An alien cannot acquire land by mere operation of law, *McClenaghan v. McClenaghan*, 1 Strobh. Eq. 295; and it is also said that he can acquire no estate in his wife's lands by marriage, *Mussey v. Pierie*, 24 Me. 559; yet this statement must be taken with a qualification, for his joinder with her a conveyance of her land will pass a good title, *Whiting v. Stevens*, 4 Conn. 44; *Kottman v. Ayer*, 1 Strobh. 552.

Alien cannot take by Descent.

The general rule of law is that an alien cannot take land by descent, the law denying to him the possession of inheritable blood, or the right to take wherever the right is sought to be derived from the act of the law and not from the act of parties, Co. Lit. 8 a; *Orr v. Hodgson*, 4 Wheat. 453; *Trezevant v. Estate of Osborn*, 3 Brev. 29; *Smith v. Zaner*, 4 Ala. 99; *Mooers v. White*, 6 J. C. R. 360; *Doe v. Acklar*, 7 Wheat. 535; *Sutliff v. Forgey*, 1 Cowen 89; *Montgomery v. Dorion*, 7 N. H. 475; *Lessee of Levy v. McCartee*, 6 Pet. 102; *People v. Conklin*, 2 Hill 67; *Doe ex d. Huddleston v. Lazenby*, 1 Ind. 234; *Hunt v. Warnicke's Heirs*, Hardin 61; *Yeaker's Heirs v. Yeaker's Heirs*, 4 Met. (Ky) 33; *White v. White*, 2 Id. 185.

As an alien has no inheritable blood, a descent cannot be cast upon him, for the law does nothing uselessly; and where an alien stands in such a position that he would take as heir but for his alienage, the title to the land vests in the next of kin of the intestate who has inheritable blood, and who does not claim through the alien, just as though the alien were not in existence, *Orr v. Hodgson*, *supra*; *Jackson ex d. Elmendorf v. Jackson*, 7 Johns. 214; *Scott v. Cohen*, 2 N. & McC. 293; *Walker v. Potomac Ferry Co.*, 3 McA. 440.

In Kentucky the law is otherwise, and there it is held that the title, which would go to the alien but for his alienage, vests in the State, *White v. White*, 2 Met. (Ky.) 185; *Stevenson v. Blith's Heirs*, 7 Mon. 143; *Fry, Vaughan v. Smith*, 2 Dana 40.

No title passes by the deed of an alien claiming land by descent, for no title was ever in him, and, therefore, he can convey none, *Trimbles v. Harrison*, 1 B. Mon. 140.

The question of ability to take by descent is to be determined by the status of the claimant at the time of the descent cast. In *The Lessee of Jackson v. Burns*, 3 Binney 75, TILGHMAN, C. J., said: "Considering this subject on the principle of reason abstracted from authority, it would seem that the right of taking by descent should be governed by the condition of the party at the time of the descent cast, because it is then that he is to enjoy the inheritance. The denial to aliens of the right of taking lands by descent must have been founded on political motives; on the danger of giving too much influence to persons who, so far from having a common interest with the people of the country, may have an interest directly opposed to them." In *Apthorp v. Backus*, Kirby 407, where a native of Jamaica, born in 1772, claimed as heir of her father, who died in 1773, the Court (LAW, C. J. and ELLSWORTH, J.) said: "It would be against right, that a division of a state or kingdom should work a forfeiture of property previously acquired under its laws, which is the case here. The plaintiff's title to the land in question accrued while she was not an alien, nor could she be affected by the disabilities of an alien, but was as much a citizen of the now State of Connecticut as any person at present within it, and her descent was cast under its laws." See also *People v. Conklin*, 2 Hill 67.

An exception to the rule, that status at the time of descent cast determined the question of ability to take thereby, was attempted to be established shortly after the Revolution. . . . Many British subjects, born before the 4th of July, 1776, had, after the Declaration of Independence, become heirs to persons owning lands in the United States, and the question arose whether these heirs were aliens, and subject to all the disabilities of aliens with reference to said lands or not. It was urged that they were born subject to the same sovereign as the people of the United States, and that, on the authority of Calvin's case, they should not be treated as aliens. The matter was argued before the Supreme Court of the United States in *Coxe v. McIlwain*, 2 Cr. 280, and *Lambert's Lessee v. Paine*, 3 Id. 97, and was decided by that Court in *Dawson's Lessee v. Godfrey*, 4 Cr. 321. In that case the plaintiff's lessor had been born in England before the Declaration, and had never been in the United States; it was claimed that he could take by inheritance, but the Court held otherwise. JOHNSON, J., in delivering the opinion, said: "It is evident the case [Calvin's] is not directly in point, for the only objection here to the right of recovery did not exist in Calvin's case, as whether in England or Scotland he was equally bound in allegiance to the king of Great Britain. It would be a contradiction in terms to contend that Dawson or his wife ever owed allegiance to a government which did not exist at the time of their birth. . . . In the two cases of *Coxe v. McIlwain*, and *Lambert's Lessee v. Paine*, this doctrine was amply

discussed, and this case is submitted upon those arguments. The counsel then contended that the relation of the *post-nati* of Scotland (after the Union) to the subjects of Great Britain, was identically the same with that of the *ante-nati* of Great Britain (before our Revolution) to the citizens of this country, and that the community of allegiance at the time of birth, and not the existing state of it when the descent is cast, is the principle upon which the right to inherit depends. . . . We have no doubt that the correct doctrine of the English law is, that the right to inherit depends upon the existing state of allegiance at the time of descent cast, and that the idea that it depends upon the community of allegiance at the time of birth, is a consequence which follows from the doctrine that a man can never put off his allegiance or be deprived of the benefit of it but for a crime. Community of allegiance once existing must, upon these principles, exist ever after. Hence it is that the *ante-nati* of America may continue to inherit in Great Britain because we once owed allegiance to that crown, but the same reason does not extend to the *ante-nati* of Great Britain because they never owed allegiance to our government. . . . As the common law, which is the law of Maryland, on this subject deprived an alien generally of the right of inheritance, it is incumbent upon the plaintiff to show some exception in favor of his case. But I know of no exception at common law which gives the right to inherit distinctly from the obligation of allegiance, existing either in fact or in supposition of law."

Shortly after, the same question came before the Supreme Court of Pennsylvania, in the case of *Lessee of Jackson v. Burns, supra*, and was decided in the same way. The ground of the decision was placed in a particularly clear light by Chief-Justice TILGHMAN in the opinion delivered by him as follows: "By the Declaration of Independence (4th July, 1776), all political connection between Great Britain and the United States was dissolved. From that day the State of Pennsylvania became completely sovereign and independent; and the people of Great Britain and Pennsylvania had no other relation to each other than that of aliens: in war, enemies; in peace, friends. It has never been denied that this was the case so far as respected sovereignty and allegiance. But it has been contended, that by the principles of the common law prevailing in both countries, certain rights flowing from former connection remained in the people of each; that the right of inheritance was unimpaired in all those who were born before the dismemberment of the British empire, because the people of both countries were once bound in allegiance to the same sovereign. . . . I suspect, if the principle contended for could be traced to its source, it would be found to have originated in another principle not compatible with the Constitution of Pennsylvania or her sister States; that is to say, that no man can, even for the most press-

ing reasons, divest himself of the allegiance under which he was born. This doctrine is founded chiefly upon Calvin's case. To the main point decided in that case, there can be no objection; it was simply this, that Calvin, who was born in Scotland *after* the crowns of Scotland and England were united in the person of James I., was not to be considered as an alien in England. But the judges, in the course of their arguments, laid down many other principles, which being collateral, to the point in question, were in some measure extrajudicial; and it is certain that they have not all been received with approbation by their successors. I am informed, however, and believe it to be a fact, that by the law as *now* held in England, citizens of the United States, born before the Revolution, are capable of taking lands in England by descent. It is supposed by some, that merely for that reason the Courts of the United States should extend the same principle to the subjects of Great Britain. To this I cannot assent. I confess I should be mortified, if my own country were surpassed by any on the globe in acts of humanity and benevolence. But it is evident that Courts of justice have no right to regulate these matters. They are for the sovereign power of the nation. The judges must decide according to the law. The English adhere to their principle, that those who were born under the king's allegiance, can never be considered so completely aliens as to be incapacitated from taking lands by descent. But I apprehend that they restrict the right of inheritance to the case of persons either *born* under the king's allegiance or being under it at the time of the descent cast. I presume they do not extend it to all those who have owed a temporary allegiance; for instance, to the inhabitants of a country conquered in war, and ceded by the treaty of peace to its former sovereign. This principle then, even if sound, cannot be applied to the circumstances of the United States; because, although there was a time when the people of England and the United States owed allegiance to the same sovereign, yet there never was a time when the people of England owed allegiance to the United States." The Court accordingly held that the *ante-natus* could not inherit.

The same doctrine was announced in *Blight's Lessee v. Rochester*, 7 Wheat. 535; *Hebron v. Colchester*, 5 Day 169; *Contee v. Godfrey*, 1 Cr. C. C. 479; *Inglis v. Trustees of Sailor's Snug Harbor*, 3 Pet. 99; *Clifton v. Executors of Haig*, 4 Desau. 330.

A different view was taken in New York in *Jackson ex d. Gansevoort v. Lunn*, 3 Johns. Cas. 109. That case was as follows: The mother of the wife of Lord Gage was seized, on July 4, 1776, of certain lands in New York; she died in the fall of that year. It was held that her heir, Lady Gage, who at the time of the Declaration was an infant, could inherit from her mother. KENT, J., said: "One of the inherent properties of the fee

she [Lady Gage's mother] held, was its capacity to be transmitted by descent, and if her issue, then alive and born, and living in England, were by the Revolution rendered incapable of taking these lands by inheritance, the Revolution did then, in fact, impair one of the most valuable ingredients in her title. It destroyed her then existing inheritable blood. . . . It is, perhaps, the better opinion that as to the title to land acquired previously to the Revolution, the right of the British subject to transmit the same by descent continued unaltered and unimpaired, at least to the heirs *in esse* at the time of the Revolution. This admission will not controvert the general rule that a natural-born subject cannot transmit his inheritance to an alien heir (Co. Lit. 8 a), because this is the peculiar and extraordinary case of a revolution in which the heir was not an alien when the Revolution took place." The doctrine of this case, however, never obtained, and in spite of the support derived from the name of Kent, it was repudiated in its own State. In *Orser v. Hoag*, 3 Hill 79, it is said by the Court: "The distinction upon which the exception to the general rule was sought to be sustained in *Jackson v. Lunn*, has been repeatedly repudiated as unfounded in law or reason."

Title not Derivable through Alien Ancestor.

An alien having no inheritable blood can neither receive nor transmit an inheritance; and, therefore, wherever it becomes necessary to derive title through an alien ancestor, the title fails, even though the title is sought to be made, collaterally, from one citizen to another, *Lessee of Levy v. McCarter*, 6 Pet. 102; *Jackson v. Fitzsimmons*, 10 Wend. 9.

Stat. 11 and 12 Wm. III., and State Legislation, upon the same Subject.

As this rule sometimes causes hardship, and as there is no policy of law to be subserved by excluding a citizen, so deriving his title, from its enjoyment, acts in imitation of the English Statute of 11 and 12 William III., c. 6, entitled, "An Act to enable His Majesty's natural-born subjects to inherit the estate of their ancestors, either lineal or collateral, notwithstanding their father or mother were aliens." It was retained in force in Pennsylvania: see report of the judges, appendix to 6 Binney 527; Maryland, see *McCreery's Lessee v. Somerville*, 9 Wheat. 354; and, perhaps, in some other States. It enacted "that all and every person, being the king's natural-born subject or subjects, within any of the king's realms or dominions, should and might thereafter inherit, and be inheritable as heir or

heirs, and make their pedigree and titles by descent from any of their ancestors, lineal or collateral, although the father and mother, 'or father or mother or other ancestor . . . by, from, through, or under whom, he, she, or they should make or derive their title or pedigree, were, or was or should be, born out of the king's allegiance, and out of His Majesty's realms and dominions, as freely, fully, and effectively to all intents and purposes, as if such father and mother, or father or mother or other ancestor, had been naturalized or natural-born subjects."

This statute, it is held, does not create a new heir, but merely does away with a disability arising from the heir being obliged to derive his title through an alien, and, therefore, does not enable a citizen, whose alien ancestor is still living, to take land as by descent. As said by STORY, J., in *McCreery's Lessee v. Somerville*, 9 Wheat. 354, "it puts the party in the same situation, and no other, that he would be in if his parents were not aliens. . . . If the Legislature had intended not only to create inheritable blood but also to create absolute heirship, some explanatory language would have been used; the statute would have declared not only that the party should make title by descent, in the same manner as if his parents were natural-born subjects, but that he should be deemed the heir whether his parents were living or dead."

The like was the effect of the New York Statute of 1830, which was passed with the same object as that of the Statute of William III., and under it a citizen whose alien ancestor, through whom his title must come, is living cannot take, *People v. Irvin*, 21 Wend. 128.

The North Carolina Act of 1801, § 2, however, differs from the English act, and makes an heir out of the citizen, although his alien ancestor be still alive. The preamble of the act recites that it is "contrary to the true policy of this government that lands should escheat to the State through failure of blood, when any relations of the ancestor exist, who in any case might, or in justice ought to, inherit." And the object of the law, according to PEARSON, C. J., was to prevent the alien from enacting the part of the dog-in-the-manger, and preventing the citizen from having what he himself could not enjoy, *Campbell v. Campbell*, 5 Jones, Eq. 246; *Den ex d. Rutherford's Heirs v. Wolfe*, 3 Hawks. 272.

In Virginia, by the statute of descents, 1 Rev. Code (1819), Ch. 96, c. 18, p. 351, the life of the alien ancestor did not bar the descent as in the case of the English statute, *Jacksons v. Sanders*, 2 Leigh 109.

In Texas, it is held that descent may be cast through a living alien ancestor, and that he will be regarded as *civiliter mortuus*, *Hanrick v. Hanrick*, 54 Tex. 101.

The same has been held to be the effect of the statute of Missouri, Gen. Stats. (1865), Ch. 129, p. 517, by the Supreme and Circuit Courts of the

United States, *Sullivan v. Burnett*, 4 Morr. Trans. 671; but there is no decision of the Supreme Court of the State upon the statute.

The general rule obtains in Indiana, but a statute of 1852, 1 G. & H., § 1, p. 255, removed the disability to inherit in favor of resident aliens, *Murray et al. v. Kelly et al.*, 27 Ind. 42.

Alienage of Father not a Bar to Inheritance between Brothers.

The alienage of a common father does not impede the descent of land from one brother to another, *Parish v. Ward*, 28 Barb. 328; *Luhrs v. Eimer*, 80 N. Y. 171.

Exceptions to Rule that Alien cannot take by Descent.

There are some exceptions to the rule that an alien cannot take or transmit land by descent. Thus where an alien takes land by virtue of legislative provisions, his lands will descend to his heirs, although aliens, *Jackson ex d. Smith v. Adams*, 7 Wend. 367; and where the commonwealth has conveyed land to an alien, for a valuable consideration, with warranty, it has been held that the State is estopped from settling up against the heirs of the alien, their or his alienage, *Commonwealth v. Heirs of André et al.*, 3 Pick. 224; but it is also held that a private act of Legislature, authorizing an alien to take, hold and alienate land in like manner as a citizen, will not so far change the law of descent as to remove the bar of alienage against an heir, but will merely allow the land to descend to the nearest of kin of the decedent, who is not under disability to take, *Parish v. Ward*, 28 Barb. 328; *Goodell v. Jackson*, 20 Johns. 707; *Jackson v. Ety*, 5 Cow. 314; *Jackson v. Adams*, *supra*; *McGregor v. Comstock*, 3 Comst. 408.

Where an alien has received a patent from the United States for land in Iowa, and dies, his resident heirs can take his estate, since the States of Iowa and Florida were admitted to the Union on condition that they should not interfere with the primary disposal of the soil by the United States, *King v. Ware*, 53 Iowa 97.

On Death of Alien, Land Escheats without Office Found.

When an alien, who has purchased land, dies, no office having been found in his lifetime, his estate escheats, without office found, and the State becomes at once entitled thereto, *Moore v. White*, 6 Johns. Ch. 360; *Stevenson et ux. v. Dunlap and Blight's Heirs*, 7 T. B. M. 134; *Slater v. Nason*, 15 Pick. 345; *Jackson v. Adams*, 7 Wend. 367; *Farrar v. Dean*, 24 Mo. 16; *Crane v. Reeder*, 21 Mich. 24; *Ettenheimer v. Heffernan*, 66 Barb. 374; *Larreau v. Davignon*, 5 Abb. Pr. R. 367.

In North Carolina, an exception appears to be made in favor of the native-born child of an alien; and it is there held that such child will succeed to his father's lands if the title thereto has not been divested by an office found in the ancestor's lifetime; but that where the child is an alien, the ordinary rule that no office found is necessary to prevent the descent being cast upon him prevails, *Den ex d. Trustees of the University v. Miller*, 3 Dev. 188.

Disability of Alienage not Avoided by a Trust.

The rule as to purchase and devise of land is the same in equity as at law, *Cross v. De Valle*, 1 Cliff. 282; S. C. 1 Wall 5; and the disabilities of an alienage cannot be avoided by means of a trust; and where land is conveyed or devised to a citizen on a trust, express or secret, that he shall hold for the use of an alien, a court of equity will not enforce the trust in favor of the alien, *Atkins v. Kron*, 5 Ired. Eq. 207, but will consider the trustee seized to the use of the State, and will enforce the trust for its benefit, so as to vest the alien's title in the State. In *Hubbard v. Goodwin*, 3 Leigh 492, where the question was very carefully considered, CARR, J., after reciting the legal restrictions resting upon an alien, said: "Would it not seem a strange inconsistency in the law, if principles so vital, so carefully guarded, might be rendered a dead letter by a mere change in the form of conveyance? And yet this would be very much the case if, by making a citizen the trustee, the beneficial interest of the alien in the land would be placed beyond the reach of the sovereign. . . . But the law is not justly chargeable with such inconsistency. . . . I conclude, then, the commonwealth had a right to recover this estate by bill in equity;" and TUCKER, P., said: "I am very clearly of opinion, that where, for the purpose of evading the law which prohibits an alien to hold lands, he purchases real estate in the name of a trustee, upon an express or secret trust, to be permitted to take and receive the rents and profits, this is such a trust as in reason, and upon the well-received principles of equity, as well as upon authority, will pass to the State, and be enforced at its instance and in its favor.

"In reason, indeed, there can be no doubt. The inhibition of the law would be vain and nugatory if it could be evaded by such a trust. The policy of the rule which denies to an alien the capacity to hold lands for his own benefit, rests upon the ground that it is unwise to permit the soil of the country to be in the hands of the subjects of a foreign power, and its revenues to be enjoyed by them; since the State must be impoverished by transporting the revenue of the land into foreign countries, and weak-

ened by putting a part of its territory under subjection to a foreign Prince. Now, in a trust of this description, every evil that can flow from the conveyance of the legal title equally exists, and hence we shall find that for centuries past, it has been held that the use of an alien shall go to the king. Had not this principle been adopted, the Courts must either have permitted the alien to enforce the trust, which would have been a direct infraction of the policy of the law, or they must have held the trustee entitled to the property for his own use, which would have been to hold out to him the wages of treason." See also *Leggett v. Dubois*, 5 Paige 114, where it is held that the Court would not raise a resulting trust in favor of an alien whose money had purchased land, the title to which had been placed in a citizen, *WALWORTH*, Ch., saying: "The law will never cast the legal or equitable estate upon a person who has no right to hold it. . . . When an alien purchases land, and takes an absolute conveyance in the name of a citizen, without any agreement or declaration of trust, the law will not raise a trust in favor of the alien purchaser, who cannot hold the land any more than it would cast it by descent upon alien heirs, who cannot hold it against the State." See also *Hammekin v. Clayton*, 2 Woods 336. It is also held that where title to realty is in a citizen, as agent for aliens, who, if citizens, might at any time compel a conveyance to themselves, on tendering the purchase money, there is such an interest of the alien therein as will pass to the State under an act of confiscation, *Day v. Murdoch*, 1 Munf. 460.

The State, however, must enforce the trust in the lifetime of the alien *cestui que trust*, and, therefore, where there was a devise to a trustee in trust for the sole and separate use of an alien feme covert for life, with power to the feme covert to appoint the fee by will, and the feme covert, having appointed, died, it was held that the forfeiture, not having been enforced by the State during the lifetime of the alien, could not be enforced against appointees, not personally disabled by alienage, *Escheator of S. Philip's and L. Michael's v. The Real Estate of Hester Smith*, 4 McC. 452. It will be seen that the rule here in equity is somewhat different from that at law, unless the appointment is to be regarded as a conveyance, and as validated by the rule which sustains a conveyance made before office found; this explanation, however, would not apply in a case where the native heir of a *cestui que use* took the equitable estate by descent.

Devise or Conveyance in Trust to Sell and Pay Proceeds to an Alien, or to Convey to an Alien when Naturalized, not Invalid.

A devise or conveyance to a citizen in trust, to sell as soon as practicable and pay over the proceeds to an alien, is not invalid, as in that case there

is no intention that the land shall be *held* for the benefit of an alien, *Anstice v. Brown*, 6 Paige 448; *Craig v. Leslie*, 3 Wheat. 563; and a devise of land in trust, to hold for the use of A., an alien, the legal title to be vested in the trustee until such time as A. shall become duly qualified to hold realty, and then to convey to A., has been upheld, the Court regarding the estate as given on condition precedent of naturalization, and a devise in the same will, of profits of realty to be paid to an alien before naturalization, was held to be subject to forfeiture, *McCaw v. Galbraith*, 7 Rich. 74. In giving judgment in that case, WARDLAW, J., said: "It is contrary to the policy of the law, that an alien, especially one residing abroad, should hold lands in this State or enjoy their profits; but it is not contrary to such policy, that lands should be conveyed to one abroad after he has become naturalized, or that lands and their accumulated profits should be held by a citizen in expectation of the naturalization of a foreigner to whom, in that event, they are to be conveyed. A trust to pay profits, or to convey land to an alien, falls within the principles which prevent an alien from holding the lands which he purchases. If the trust here was to convey unconditionally to Hugh Hackett, an alien, we say not now whether it would be held that, notwithstanding the contrary intent of the testator, the legal estate would be transferred by the Statute of Uses to the alien, so that it might be forfeited, or that the trust would be binding, so that a title would result to the heirs, or the trustees would take the legal estate and the alien the trust, subject to such right as might be urged on behalf of the State."

Carrying out the principles above indicated, it is held, that while equity will not decree a conveyance to an alien, yet if he has taken land in payment for a debt, it will order a sale and the payment of the proceeds to the alien, *Merle v. Andrews*, 4 Tex. 200.

Enforcement by State, for its own Benefit, of a Trust for Alien.

Before any title vests in the State, whereby it can enforce a trust for an alien for its own benefit, the fact that the trust is for an alien must be found by an inquest of office or equivalent proceeding, *McCaw v. Galbraith*, *supra*; *Jackson ex d. Culverhouse v. Beach*, 1 Johns. Cas. 399.

Land of Alien Grantee of the United States Escheats to the State.

In the case of an escheat, for want of competent heirs of lands granted by the United States to an alien, the land is taken by the State as sovereign of the realty, and not by the United States by way of reversion, *Etheridge v. Doe ex d. Malempre*, 18 Ala. 565.

Effect of Naturalization.

Naturalization has the effect of making an alien competent to hold and receive lands as a citizen; it takes away any defect of blood, and the alien may inherit as though native born. It has, however, no such retroactive effect as will enable him to take, as heir, lands, the descent of which was cast before his naturalization, *Vaux v. Nesbit*, 1 McCord Ch. 372; *People v. Conklin*, 2 Hill 67; *Heeney v. Trustees of Brooklyn Benevolent Society*, 33 Barb. 360; or vest an estate, *Keenan v. Keenan*, 7 Rich. 345; but naturalization will confirm a title, previously acquired, by purchase or devise, *Jackson ex d. Doran v. Green*, 7 Wend. 333; *Harley v. State ex rel. the Attorney-General*, 40 Ala. 689. It will not have the effect of depriving the subject of it of rights previously given to him by the Legislature. Thus in *Spratt v. Spratt*, 4 Pet. 393, an alien was given power, by an act, to take and transmit to his heir, property, as though he and they were citizens. He was afterwards naturalized. The Court held that, as to the lands acquired by him before naturalization, his alien heirs could inherit, and would not be barred by the rule which would prohibit an alien taking, by descent, from a citizen. In delivering the opinion, MARSHALL, C. J., said: "The words . . . are not inoperative, since they give a capacity which citizenship does not give—the capacity of transmitting to relatives who are foreigners. This capacity is given absolutely by the act, and is not, we think, affected by his becoming a citizen."

Federal and State Rights to Regulate Tenure of Property by Alien.

The right to naturalize, so as to give the full rights of citizenship, rests, under the Constitution of the United States, with the federal authority exclusively, and for the excellent reason, that, as the citizen of any State is entitled to the privileges of citizenship in all the other States, were the law otherwise, any one State might regulate citizenship for all the other members of the Union; but a State may render an alien capable of taking by descent, or holding land, without conferring on him the rights of citizenship, *Montgomery v. Dorion*, 7 N. H. 475; *Etheridge v. Doe ex d. Malempre*, 18 Ala. 565, as the right to regulate the descent and tenure of realty falls within the power of the State. Chief-Justice REDFIELD, in *State v. Boston, Concord and Montreal R. R. Co.*, 25 Vt. 433, indeed, argued to the contrary, as follows: "It seems to me that the right to interfere with aliens holding real estate in this country, strictly and appropriately belongs to the national, and not the State, sovereignty. It goes upon the basis of some defect in allegiance, and allegiance is a matter pertaining

altogether to the national sovereignty. They have the exclusive control of all relations between this country and foreign nations and their citizens. And the States are expressly prohibited, in the United States Constitution, from attempting any stipulation, treaty, or compact upon the subject. And the national government have already assumed to enter into stipulations with some European nations upon this particular subject. In the consular treaty, lately concluded between France and the United States, it is, by the Seventh Article, stipulated that in all the States of the Union, whose laws permit, Frenchmen shall enjoy the right of possessing personal and real estate in the same manner as citizens of the United States, and the President engages to recommend to such States as do not permit aliens to hold real estate, to pass such laws as may confer the right. This shows in what light the national sovereignty is disposed to regard the matter. Indeed, after proclaiming ourselves the asylum of the oppressed and the home of the homeless and desolate, it would certainly have an ugly sound, to declare aliens incapable of acquiring and holding real estate in time of peace, they approving themselves peaceable and quiet dwellers upon our shores. Indeed, I conjecture it will be found, in fact, altogether impracticable, to exercise any such power in these States at the mere option of the State sovereignty, as is done in England by what they denote an inquest of office."

It is submitted that this claim of the exclusive right for the federal government to fix the status of aliens, with respect to their acquisition and possession of realty, is too broad, and certainly not in accordance with the position taken by the federal government. The consular treaty, cited by the learned judge, is in itself the highest evidence of deference to State authority; the President engages, "to recommend to such States" a more liberal policy. While it is true that the President and Senate, by some treaties, have done, by indirection, what the Congress at large is given no power to do directly, namely, conferred certain property rights upon aliens, and it seems confessed, though not without some dissent, that it was rightfully done, yet the vast majority of treaties have recognized the right of the State to prohibit the tenure of land by an alien, and have only provided for the withdrawal of the proceeds of a sale of land by the alien, and granting the power in the federal government to exercise, by treaty, to the full. Yet this is very different from the assertion of an exclusive right; at most, it would show a co-ordinate power existing in both State and federal government. The argument in favor of the exclusive rights rests mainly upon the theory advanced, that "allegiance is a matter pertaining altogether to the national sovereignty;" but the States have not been slow to assert for themselves a claim to the allegiance of their citizens. See, as examples

of this, the statutes defining and punishing treason to the State, of Pennsylvania, Ohio, Maryland, and Massachusetts. So that on any ground upon which we consider the question, whether merely in theory or in the light of the practice of the country, there would seem to be no doubt that a State can regulate the tenure of land within its boundaries, and may admit aliens, denied citizenship by the federal authority, to such rights in real property as it sees fit.

No Rights acquired by Declaration of Intention to become a Citizen.

In order that naturalization may confer any right of inheritance, it must be complete, and no right is acquired by the mere declaration of intention to become a citizen, *McDaniel v. Richards*, 1 McCord 187.

Statutory Regulations.

It is to be premised, that an act, enabling an alien to take, hold, or inherit lands, is to be strictly construed as in derogation of the common law. Thus, an act authorizing the descent to alien heirs of lands held by aliens, by deed or will, was held not to authorize the descent of land purchased by an alien at a chancery sale, for which no deed was executed prior to the death or naturalization of the purchaser, *Spratt v. Spratt*, 4 Pet. 393.

The following is a brief statement of the effect of the statutes upon the subject of aliens, with reference to their capacity to take or hold lands in the various States:

Alabama.—There is no restriction upon an alien, and he may take by purchase or descent, and may transmit the inheritance as may a native, Code (1876), Tit. 7, Ch. 2, § 2860, p. 677.

Arkansas.—Aliens, who are *bona-fide* residents of the State, have the same rights in realty as have citizens, Const., Art. I., § 20; Rev. Stat., Ch. III., § 224.

California.—The Constitution gives full rights of real property to resident aliens. This is not extended so as to permit non-resident aliens to take by descent, *Siemssen v. Bofer*, 6 Cal. 250; *Farrell v. Enright*, 12 Id. 450; and to be capable of taking by descent, the alien must have been resident at the time of descent cast. The Civil Code of 1876, however, removes all restrictions from aliens, except that it requires the alien to make his claim of property within five years of the accrual of his title, Div. 2, Pt. I., Tit. 2, Ch. 1, §§ 5671, 5672.

Colorado.—An alien is placed, as to real property, on the same footing as a citizen, Gen. Laws, Ch. IV., § 15.

Connecticut.—Aliens resident in the United States, and also Frenchmen, "so long as France accords the same rights to citizens of the United States," have the same property rights as citizens, Gen. Laws, Tit. 2, Ch. 1, § 4.

Delaware.—Aliens resident in this State, who have declared their intention of becoming citizens of the United States, may take, hold, and inherit as citizens may, and the heir of such an alien may take, by inheritance, if residing within the United States at the time of the intestate's death, Laws, Delaware, Tit. 12, Ch. 81, § 1, p. 493.

Florida.—All restrictions are removed, Laws of Florida (McClellan's Dig. 1881), Ch. 92, §§ 7, 14, p. 470.

Georgia.—An alien may hold land, on filing an oath that he intends to improve the same, provided, that prior to his declaration of intention to become a citizen, he shall not hold more than one hundred and sixty acres, Code (1873), Pt. 2, Tit. 6, Ch. 6, § 2676, p. 465.

Illinois.—All restrictions are removed, Rev. Stats. (Hurd 1880), Ch. 6, § 1, p. 136.

Indiana.—Formerly, while an alien, who had declared his intention to become a citizen, could purchase and hold land, *State v. Blackmo*, 8 Blackf. 246, yet, if he died before naturalization, a minor child, who had not been reported by his or her father at the time of declaration of intention, could not succeed to the land as heir, *Eldon v. Doe d. Wynn*, 6 Blackf. 341; but at present the law permits an alien to acquire land by descent or devise; but if he be an alien, non-resident of the United States, he can hold land, acquired by descent, only for eight years after the final settlement of the estate of the decedent from whom it is inherited, Act, March 9, 1861, Stat. of Ind., Revision of 1876, Vol. I., p. 61.

Iowa.—An enabling act was passed March 15, 1858 (Rev. St., §§ 2488–2493), and was held to give the power of inheritance to any alien becoming a resident of the United States, but to deny it to non-residents, *Krogan v. Kinney*, 15 Iowa 242; *Rhein v. Robbins*, 20 Id. 45. These cases were overruled in *Purcell v. Smidt*, 21 Id. 540, by a divided Court, DILLON and COLE, JJ., holding that § 2489 gave to every alien whatsoever, the right, after the passage of the act, to acquire land by descent or devise, but not to purchase, except upon condition of selling the land within ten years to a qualified person. LOWE, C. J., and WRIGHT, J., adhered to the interpretation formerly given to the act. This decision was followed in *Greenheld v. Standforth*, Id. 595, as to the capacity of non-resident aliens to inherit, but in *Brown v. Pearson*, 41 Id. 481, the Court returned to the doctrine of *Krogan v. Kinney*. The doubt in the matter was, at least as to future titles, or cases subsequently arising, finally settled by an act of Legislature, re-

moving all restrictions upon the right of aliens to hold lands, Annotated Stats. Iowa (McClain 1880), Pt. 2, Tit. XIII., Ch. 1, § 1908.

Kansas.—Restrictions upon the holding or taking of land are forbidden by the seventeenth section of the Bill of Rights.

Kentucky.—An alien may take land by purchase, but not by descent, Rev. St. (Stanton 1860), p. 65; and see the case of *White v. White* in the note to same. After declaring his intention to become a citizen, the alien may hold land, Gen. Stats. (1873), Ch. 14, Art. III., § 1.

Maine.—There are no restrictions, Gen. Stats. (1871), Tit. VII., Ch. 73, § 1, p. 559.

Maryland.—There are no restrictions upon aliens who are not enemies, Rev. Code (1878), Art. 45, § 8.

Massachusetts.—"Aliens may take, hold, transmit, and convey real estate, and no title to real estate shall be invalid on account of the alienage of any former owner; but nothing contained in this section shall defeat the title to any real estate heretofore released and conveyed by the commonwealth, or by authority thereof," Gen. Stats., Ch. 90, § 38; Pub. Stat. (1882), Pt. 2, Tit. 1, Ch. 126, § 1, p. 744.

Michigan.—By the Constitution, aliens who are *bona-fide* residents of the State are insured the same rights, in respect to the possession, enjoyment, and inheritance of property, as native-born citizens, Art. XVIII., § 13.

Minnesota.—An alien is empowered to take, hold, transmit, and convey real estate in the same manner as a citizen, Stats. (1878), Ch. 75, § 41, p. 820.

Mississippi.—Under the latest revised code, there is no restriction upon an alien, Ch. 44, § 1230.

Missouri.—Prior to the enactments at present in force, an alien resident in the United States could take by descent, but one resident abroad could not, *Wacker v. Wacker*, 26 Mo. 426. In the case of an alien, resident in any of the United States other than Missouri, in order to enable him to take by descent, he must have made a declaration of intention to become a citizen; this declaration was not required of an alien resident in Missouri, *Sullivan v. Burnett*, 4 Morr. Trans. 671. Now all restrictions are removed, Rev. Stats., Ch. 3, § 325, p. 49. The removal is, however, prospective only, *Sullivan v. Burnett*, *supra*.

Nebraska.—It is provided by the Constitution that no distinction shall be made as to property rights between resident aliens and citizens, Const., Art. I., § 25; and, by statute, all restrictions upon the holding or taking of realty by non-resident aliens have been removed, Comp. Stats. (Brown 1881), Ch. 73, § 54, p. 394.

New Hampshire.—All restraints are removed as to resident aliens, Gen. Laws, Ch. 135, § 16.

New Jersey.—There is no restraint upon alien friends, Revision of 1877 (Stewart), p. 6, §§ 1, 2, 3.

New York.—In 1798, an act was passed, limited in duration to three years, validating conveyances to alien friends, Act, April 2, 1798. An alien taking under this act had the right to convey, and property taken by virtue thereof can be held by alien grantees, or devisees, until it comes to the hands of a citizen, and that notwithstanding the subsequent change of policy by the State with reference to aliens, *Duke of Cumberland v. Graves*, 7 N. Y. 305; *People v. Snyder*, 41 Id. 397; an alien, however, could not, under this act, make a lease reserving a rent, *Troup, Admr. v. Mulender*, 9 Johns. 303.

In 1802, an act was passed extending the privileges of the Act of 1798 to resident aliens, Act of March 26, 1802, which were, in 1804, 1805, and 1808, extended to those becoming inhabitants up to the close of the session of the Legislature of the latter year. In 1825 was passed the Act of April 21, 1825, which is substantially the law at present; see 2 Rev. St., Part II., p. 1093, §§ 31–34; Rev. St., Art. 2, §§ 31, 32; Rev. St. (1882), Pt. 2, Ch. 1, Tit. 1, p. 2164. It is as follows: “§ 15. Any alien who has come, or may hereafter come, into the United States, may make a deposition or affidavit in writing . . . that he is a resident of, and intends always to reside in, the United States, and to become a citizen thereof as soon as he can be naturalized, and that he has taken such incipient measures, as the laws of the United States require, to enable him to obtain naturalization, which shall be certified,” etc.

“§ 16. Any alien, who shall make and file such deposition thereupon, shall be authorized and enabled to take and hold lands and real estate of any kind whatsoever, to him, his heir, and assigns, forever, and may, during six years thereafter, sell, assign, mortgage, demise, and dispose of the same in any manner, as he might or could do if he were a native citizen of this State, or of the United States, except that no such alien shall have the power to lease or demise any real estate which he may take or hold by virtue of this provision, until he become naturalized.

“§ 17. Such alien shall not be capable of taking or holding any land or real estate which may have descended or become devised or conveyed to him previously to his having become such resident, and made such deposition or affidavit as aforesaid.

“§ 18. When such alien shall die, within six years after making and filing such deposition, intestate, leaving heirs inhabitants of the United States, such heirs shall take, by descent, and hold any real estate of which

such alien died seized in the same manner as they would have inherited if such alien had been at the time of his death a citizen of this State."

The statute bound aliens resident at the time of its passage, and they were, as well as those afterwards removing into the country, compelled to make the deposition required, in order to be assured in their lands, *Kennedy v. Wood*, 20 Wend. 230.

It was contended, early in the litigation upon the above statute, that the Legislature had by it provided a complete system whereby aliens could hold and acquire land, and that all the rules of the common law with reference thereto were abrogated. In the case of *The Matter of Leefe and Wife*, 4 Edw. 395, McCoun, V. C., condemned this view; but in *Currin v. Finn*, 3 Denio 229, the Court said that the Act of April 21, 1825, modified all previous statutes, and that no alien could, after its passage, take land by purchase without complying with the provisions of the act. In *Wright v. Saddler*, 20 N. Y. 320, the matter came squarely before the Court of Appeals, whether, where lands had been conveyed jointly to a wife and an alien husband, the alienage of the latter would, on his wife's death, prevent the title to the whole vesting in him, subject to the State's right of forfeiture. The Court held that it would not. COMSTOCK, J., in delivering the opinion, discussed quite fully the object and effect of the act. After adverting to the position that the common law had been abrogated thereby, he said: "If this is a correct view of the statute, one of two results must follow: 1. That any attempt to convey lands to an alien, who has not filed such deposition, vests the title and seizin in the State instantly, and without any judicial proceeding to recover the land, as an escheat; or, 2. That the conveyance is void, leaving the title in the grantor. It has been argued that the deed in such a case is void; but the contrary is, I think, plainly true. In the case of a devise to an alien, who is not authorized by any general or particular statute to hold real estate, such devise is declared, by a provision in the statute of wills, to be void; and the interest, or estate so devised, descends to the heirs of the testator, if there be any, and if not, then it will go to the resident devisee, if there are any competent to take, 2 Rev. St. 57, § 4. In this respect, the Revised Statutes have changed the common law by a provision which is free from all doubt.

"The question then is this: At the common law, as we have seen, the title to lands conveyed to an alien vested in him subject to a defeasance or forfeit in favor of the State. . . . I am of opinion that, in the respect under consideration, the rule of the common law is still in force, notwithstanding the provisions of the statute which have been referred to. The policy of the enactment, I think, is obvious. It was to enable resident aliens, intending to become citizens, on filing the required deposition in the office of

the Secretary of State, to hold real estate as though they were in fact citizens. . . . The policy of these laws, in short, is liberal and not restrictive; they were not designed to subvert the defeasible rights which the common law conceded to aliens, but to enlarge their rights, and convert them into estates of a higher order, on the condition of residence, and an intention to become citizens, to be made manifest by a deposition. . . . I do not overlook the language of the seventeenth section. . . . Now, 'such alien' is the resident alien mentioned in the preceding sections, who has filed the deposition therein required, and the object of the provision is precisely to confine the peculiar benefits of these statutes to cases where the lands are acquired after the condition has been performed. As to lands previously acquired, and those acquired by aliens who are not within these statutes at all, by reason of non-residence, or by reason of not having filed the deposition, the common law was left in force. According to the defendant's construction, 'such alien,' that is, plainly the resident aliens, who alone are mentioned in the context, cannot take lands in any sense, not even subject to the right of escheat, until they have filed their deposition as required. This construction leads to a discrimination between resident and non-resident aliens unfavorable to the residents, which the Legislature certainly did not intend to make. For while non-resident aliens are not the subject of the statute at all, and may take lands as at common law, those who reside here, but have not filed the deposition, according to this argument, are deprived of the capacity which they would have if they remained in the countries where they were born."

Under the act of 1825, it is held that where, *after the death of a husband*, who had taken the first steps towards naturalization, an alien wife filed the required deposition, and was naturalized, she is not thereby entitled to take, by a devise, from him, *Mick v. Mick*, 10 Wend. 379; nor can an alien heir inherit from a naturalized ancestor, without previously complying with the law as to the deposition, *McCarty v. Terry*, 7 Lans. 236; nor can a citizen take as heir to an alien father, *Larreau v. Davignon*, 5 Abb., Pr. R. N. S. 367.

Under the Act of 1825, where land is devised to an alien, it is held that the effect of the devise is to vest in him a title defeasible by the State until the proper deposition is filed, but absolute as against the heirs of the testator, *Hall v. Hall*, 81 N. Y. 130.

In 1843, an act was passed confirming titles to aliens who had become naturalized, or who became so within one year after the acts. This act is confined in its operations to the two classes named, *Heeney v. Trustees of Brooklyn Benevolent Society*, 33 Barb. 360; *Redpath v. Rich*, 3 Sand. Sup. Ct. 79.

By an Act of 1845, Ch. 115, § 4, it was enacted that on the death of any alien resident, such person as would answer the description of his heir should be permitted to take the land of the decedent, provided that, if such heir were a male over twenty-one, he should file such a deposition as was required by the Act of 1825.

This act was held to enable an alien to take land by descent from an alien resident only, but not from a citizen, *Luhrs v. Eimer*, 80 N. Y. 171. This incongruity was, however, removed by Act of 1874, Ch. 261, p. 317. See Rev. Stat. (1882), Pt. 2, Ch. 1, Tit. 1, p. 2169.

North Carolina.—There is no restriction upon an alien, *Battle's Rev.*, Ch. 3, § 1.

Ohio.—An alien may inherit and transmit an inheritance, 1 Rev. St. (1880), § 4173.

Oregon.—An alien is given the same property rights as a citizen, *Miscell. Laws*, Ch. XVII., Tit. 3, § 35, p. 588.

Pennsylvania.—The act of February 23, 1791, gave to aliens, not being subjects of an inimical power, the right to take, by devise or descent, as fully as citizens, 2 *Purd. Dig.* 65, pl. 1; 3 *Sm. Laws* 4. This act, it was decided, gave no right to an alien to inherit from an alien, for an alien having no heritable blood, could not transmit an inheritance even to a citizen, and if he could so transmit to another alien, it would be giving the latter more privileges as to inheritance than those enjoyed by a citizen, *Rubeck v. Gardner*, 7 *Watts* 455. The Act of February 10, 1807, § 1, 4 *Smith's Laws* 362, permitted alien friends, who had declared their intention of becoming citizens, to purchase and hold real estate to an amount not exceeding five hundred acres. By the Act of March 24, 1818, 7 *Smith's Laws* 133, aliens, except enemies, were authorized to hold land not exceeding five thousand acres, and finally, by Act of May 1, 1861, § 1, *P. L.* 433, *Purd. Dig.* 67, pl. 11, aliens generally were authorized to hold land not exceeding in amount five thousand acres, or, in net annual value, twenty thousand dollars.

To meet objections to title, arising from time to time, where said title had been derived through aliens, confirmatory acts have been, from time to time, framed by the Legislature. See *Purd. Dig.* 67, 68, pl. 12–19.

Rhode Island.—There is no restriction placed upon an alien as to holding land, *Gen. Stats.* (1872), Ch. 161, § 6, p. 348.

Tennessee.—By the Act of 1807, it was provided that land should descend to and vest in the next of kin to the decedent, who was resident in the United States, to the perpetual exclusion of aliens related to the decedent in a nearer degree, *Starks v. Traynor*, 11 *Humph.* 292; and by the law, as it at present stands, a resident alien, who has declared his intention of be-

coming a citizen, takes and holds as does a citizen; a non-resident may take by devise, and is allowed seven years within which to dispose of the land devised, Stats. Tenn. (1871), Pt. 2, Tit. 1, Ch. 2, §§ 1999, 2000.

Texas.—Under the laws of Mexico, aliens were incapable of acquiring land unless, having been naturalized, they should marry a Mexican woman, *Heir of Clay v. Clay*, 26 Tex. 24; and aliens could not take by descent, *Yates v. Iams*, 10 Tex. 168; *Hornsby v. Bacon*, 20 Id. 556; *Blythe v. Easterling*, Id. 565; *Middleton v. McGrew*, 23 How. 45. Under these laws a citizen of the United States was incapable of acquiring land as against the government, but if he had acquired land, and no action was taken by the government against him, his title became confirmed on the annexation of Texas to the United States, *Osterman v. Baldwin*, 6 Wall. 116.

By the statute of 1840, Hart's Dig., Art. 585, an alien heir was allowed nine years within which to become a citizen or sell the land. . . . The act contained no exception in favor of those under disability. It was held that under this law the alien heir took a defeasible estate on condition of becoming a citizen or selling the land, that the condition was for the benefit of the government, and that on failure to fulfil the condition, the title vested in the State, and not in the next of kin capable of taking, *Barclay v. Cameron*, 25 Tex. 232; see also *Cryer v. Andrews*, 11 Tex. 170; *Wardrup v. Jones*, 23 Id. 489. At present, an alien who has declared his intention of assuming citizenship, has the same rights as a citizen as to property, Pasch. Annotated Dig., 2d Ed., Art. 47, p. 106; other aliens can take and hold property in the same manner as citizens of the United States are permitted to do in their respective countries, Id., Art. 46.

Virginia.—An alien friend is in the same position as to property rights as citizen, Code (1873), Ch. 4, Tit. 2, § 18.

Wisconsin.—There is no restriction, Rev. St. (1878), Ch. 99, § 2200.

Vermont.—The Constitution provides that, "Any one of good character who comes to settle in the State, and takes the oath of allegiance, may have all the rights to property in realty that a citizen may," Const., Sec. 39, Rev. (1880), p. 42.

West Virginia.—There is no restriction upon the property rights of any alien not being an enemy, Rev. Stats. (1879), Ch. 3, § 1.

The power of the United States to provide, by treaties, for rights to be conceded to aliens, with reference to real property, has been recognized from early times and acted upon. A direct judicial decision as to the power is found in *People v. Gerke*, 5 Cal. 381. The right has, however, been questioned, and the grounds of objection are well stated by MURRAY, C. J., in *Siemssen v. Bofer*, 6 Cal. 250: "It cannot be contended, with any show of reason, that the Federal government took this grant of power [*i. e.* of making

treaties] in the enlarged sense in which it is exercised by England and the nations on the continent of Europe, or that she is vested with the same plenary powers that the individual States were before the adoption of the Constitution. The political structure of our government forbids such an idea. The power must be construed in reference to the powers delegated to the United States and those reserved to the States, and must be further limited to objects which are the peculiar and proper subject-matter of treaty stipulations.

"The exercise of the power under the Constitution can scarcely extend beyond that of declaring war, making peace, regulating commerce, and adjusting national misunderstandings and difficulties, and for the execution of such purposes, the power to alter the rules of descent, to change the domestic policy of a State, and to alter the laws of evidence, are not incidental any more than the right to abolish slavery or any of the other acts we have enumerated."

The earliest treaty bearing upon alien rights of property was that between the United States and France, made in 1778; by it French subjects were given the right to purchase and hold realty in the United States. See *Chirac v. Chirac*, 2 Wheat. 259. The rights vested under this treaty were held not to have been destroyed by the abrogation of the treaty, and the expiration of the subsequent convention of 1800, *Carneal v. Banks*, 10 Wheat. 181.

The treaty of peace and recognition between the United States and Great Britain of 1783 contained a provision against further confiscation, which protected British aliens in the possession of lands held by them in this country. See *Orr v. Hodgson*, 4 Wheat. 453; *Trezevant v. Estate of Osborn*, 3 Brev. 29.

The ninth article of the treaty made with Great Britain in 1794, provided that British subjects who then held lands in the United States, should continue to hold the same with like rights as natives, and that, as to such lands, neither they nor their heirs should be considered as aliens. This treaty was held to protect one who had emigrated to the United States after the Declaration, and had died there after the acknowledgment of the American independence, *Jackson ex d. Folliard v. Wright*, 4 Johns. 75.

Both of these treaties applied to and protected titles then existing, only, and suitors claiming land were held to proof of title existing, either in themselves or their ancestors, at the very time the treaty was made, *Blight's Lessee v. Rochester*, 7 Wheat. 535; *Harden v. Fisher*, 1 Id. 300; *Orr v. Hodgson*, 4 Id. 453; *Orser v. Hoag*, 3 Hill 79.

It was not necessary to show actual possession of the land, the test being the existence of title, *Harden v. Fisher, supra*. The treaties did not, how-

ever, protect a mere possessory right, although the right was afterwards, by legislative act, enlarged into a freehold, *Crane v. Reeder*, 21 Mich. 24.

The treaty of 1794 did not enable an alien heir to take lands by descent from a citizen, *Trimbles v. Harrison*, 1 B. Mon. 140; and as to lands in Maryland, it was without practical effect, since, at the date of the treaty, all lands owned by British subjects in that State were in the hands of commissioners, under an act of confiscation, *Orwings v. Norwood*, 2 H. & J. 104.

The ninth article of the treaty of 1794 was not annulled by the war of 1812. In considering this question in *Fox v. Southack*, 12 Mass. 143, the Court said: "There seems, however, to be no doubt that this article is one of those stipulations which are distinguished by some writers on the law of nations as *real* in their own nature; and which are accomplished by the act of ratification, so that they cannot be dissolved by any subsequent event. 'Pactum liberatorium, quo pax remisso aut transactio facta est qua per extinctum revisiscere non potest,' Com. of H. Cocceius sen. Grot. B. 2, c. 16, § 16." And see *Society for the Propagation of the Gospel v. Wheeler*, 2 Gall. 105; *Fiott v. Commonwealth*, 12 Gratt. 564.

The above treaties, with the exception of that of 1778, it will be noticed, were simply confirmatory of existing titles, and did not pretend in any way to interfere permanently with the State laws of descent, or with the policy of the States, as to permitting or refusing to allow aliens to hold real estate in their respective boundaries. This policy, whatever may be the right of the United States government, has, except in a few unimportant instances, as will be seen below, been constantly pursued, and the farthest, as a rule, that the general government has gone in its treaties, has been to stipulate that aliens, subjects of the power with whom the particular treaty is made, shall be allowed to sell their lands, and, within a certain time, remove from this country the proceeds thereof. The rule of law is, that when the time, limited under the treaty, has expired, if the property remains unsold, the State may take advantage of the forfeiture, *Yeaker's Heirs v. Yeaker's Heirs*, 4 Met. (Ky.) 33; but when the treaty fixes no definite time, and the laws of the State, while making land held by an alien liable to forfeiture, fix no time in which the alien may sell and withdraw the proceeds, the proceeds may be withdrawn at any time, *Hauenstein v. Lynham*, 10 Otto. 483.

The following is a brief statement of the rights of aliens with reference to realty as conferred by treaties:

Subjects of the following powers have the right to succeed to real estate by devise or *ab intestato*, and may take possession and dispose of the same at their will: New Granada, Treaty, Dec. 12, 1846, Art. XII.; San Salvador, Treaty, Jan. 2, 1850, Art. XII.; Argentine Confederation, Treaty, July 27, 1853, Art. IX.

Subjects of the following are to be allowed in those States by whose laws alienage is a disqualification to hold real property, two years to sell and withdraw the proceeds of land coming to them by descent, which time may be reasonably prolonged, according to circumstances. Wurtemberg, Treaty, April 10, 1844, Art. II.; Hesse-Cassel, Treaty, March 26, 1844, Art. II.; Bavaria, Treaty, Jan. 21, 1845, Art. II.; Saxony, Treaty, May 14, 1845, Art. II.; Nassau, Treaty, May 27, 1846, Art. II.; Austria, Treaty, May 8, 1848, Art. II.

Subjects of the following, under like circumstances, are to be allowed three years: Central America, Treaty, Dec. 5, 1825, Art. XI.; Hanseatic Republic, Treaty, Dec. 20, 1827, Art. VII.; Brazil, Treaty, Dec. 12, 1828, Art. XI.; Ecuador, Treaty, June 13, 1839, Art. XII.; Guatemala, Treaty, March 13, 1849, Art. XI.

Subjects of the following, the time allowed by the laws of the State in which the realty is situated: Russia, Treaty, Dec. 6, 18, 1832, Art. X.; Portugal, Treaty, Aug. 26, 1840, Art. XII.; Swiss Confederation, Treaty, Nov. 25, 1850, Art. V.; Brunswick and Luneburg, Treaty, Aug. 21, 1854, Art. II.; Nicaragua, Treaty, June 21, 1867, Art. VIII.; Orange Free State, Treaty, Dec. 22, 1871, Art. III.

Subjects of the following are guaranteed a reasonable time within which to sell realty and remove the proceeds thereof: Spain, Treaty, Oct. 27, 1795, Art. XI.; Prussia, Treaty, May 1, 1828, Art. XIV.; Hanover, Treaty, June 10, 1846, Art. X.; Oldenburg, Treaty, March 10, 1847; Mecklenburg-Schwerin, Treaty, Dec. 9, 1847, Art. X.; Hawaiian Islands, Treaty, Dec. 20, 1849, Art. VIII.

The treaties with Portugal and Russia also provide that where no time is limited for the withdrawal by the State laws, their subjects shall have a reasonable time for that purpose.

The treaties with Bolivia, May 13, 1858, Art. XII., and with the Dominican Republic, Feb. 8, 1867, Art. V., provide that their citizens shall have the longest time allowed by law.

The treaty with Italy, Feb. 26, 1871, Art. XXII., provides that her subjects shall be placed, with reference to taking and holding real estate in the United States, on the most favored footing.

The treaty with France, Feb. 23, 1853, Art. VII., provides that in those States "whose existing laws permit so long and to the same extent as the said laws remain in force," Frenchmen may possess land with the same rights thereto as citizens.

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